No. ———

In The
Supreme Court of the United States

HERBERT GRUBB,

Petitioner,

v.

SOUTHWEST AIRLINES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This court recently repudiated burden-shifting in an ADEA case (*Mescham v Knolls Atomic Power Laboratory*,128 S. Ct. 2395), citing the lack of congressional intent that traditional burdens of proof should be shifted. *(Id. at 2400)* Yet, the issue remains unsettled as to whether or not the court-created *McDonnell-Douglas Corporation v. Green, (411 U. S. 792)* burden-shifting protocol should continue to be utilized when courts decide FMLA and ADA cases.

Numerous circuit courts have rejected the use of burden shifting in FMLA entitlement/interference cases and ADA reasonable accommodation cases. Yet other circuit courts, including the Fifth Circuit below, continue to utilize the *McDonnell Douglass* burden shifting protocol and its progeny for FMLA entitlement/interference cases and ADA reasonable accommodation cases.

This Petition addresses the question of whether or not this court should decide the propriety of the continued application of burden shifting under *McDonnell-Douglass* and its progeny for FMLA and ADA cases in general, and in FMLA entitlement/interference cases and ADA reasonable accommodation cases in particular.

PARTIES TO THE PROCEEDINGS

Petitioner Herbert Grubb is a natural person. Respondent, Southwest Airlines, Inc. (SWA) is a publicly-held common carrier by air, a non-governmental corporation.

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The opinion of the United States Court of Appeals for the Fifth Circuit (App. 1a-16a) is unpublished but is unofficially reported at *(2008 U.S. App. LEXIS 21412, ; 21 Am. Disabilities Cas. (BNA) 231.)*

The Memorandum Opinion and Order (App. 18a-37a) of the Northern District Court of Texas is unpublished but is unofficially reported at *2007 U.S. Dist. LEXIS 42090; 19 Am. Disabilities Cas. (BNA) 719; 41 Employee Benefits Cas. (BNA) 2654; 12 Wage & Hour Cas. 2d (BNA) 1335.*

JURISDICTION

The judgment of the court of appeals (App. 1a) was entered October 10, 2008. This Court has jurisdiction pursuant to 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

29 U. S. C. § 2612 (a)(1)(d) which provides in relevant part:

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following...

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

42 U. S. C. § 12111 (8) through (10) which provides:

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include–

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training

materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include–

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U. S. C. § 12112 (a) and (b)(5)(A)and(B) which provides:

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes--

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;...

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

Petitioner Herbert Grubb brought a claim against Respondent Southwest Airlines for failure to make reasonable accommodation under the American With Disabilities Act (ADA) 42 USC § 12112 and a claim for interference with his right to leave under the Family Medical Leave Act (FMLA) 29 U. S. C. § 2612 (a)(10(D)) (App. 38a-39a)

Grubb was employed as a flight simulator instructor by Southwest Airlines, Inc., from March, 1999 to June 21, 2004 when Southwest fired him. He was required to train Southwest's captains, pilots, FAA check airmen, Southwest's management captains, Southwest's flight instructors, and Southwest's flight simulator instructors.

FAA regulations mandate the qualifications for Southwest's flight simulator instructors, (14 CFR § 121.142 (c)) currency requirements, (14 CFR § 121.414 et. seq.) and require them to undergo periodic "in line" observations, (14 CFR § 121.412 (f)(2)).

At all times during his tenure with Southwest, Grubb maintained his federally mandated qualifications, currency and passed the required "in line" observations.

In 2002 Grubb began suffering from sleep apnea which occasionally caused him to nod off for brief periods of time (App. 60a-61a) when he was training pilots in the flight simulator and at meetings. Southwest accepted all of the FAA mandated paperwork generated by Grubb thus certifying to the FAA that training and certification was properly performed, (App. 81a) and relieving Southwest from any obligation to retrain any flight crews.

During a February 10, 2004, "in line" observations, his evaluator noted, "Excellent interaction by instructor and students." (App. 41a) despite the fact that he noted that Grubb, "Worked panel well, in spite of numerous Apnea Lapses which were normally short in duration (5-8 seconds) with only one lasting in excess of 30 seconds. Did not miss any problems students had during the period." (App. 42a). (Upper case in the original)

The evaluator concluded, "I mentioned that getting on a regular schedule vs shifting schedule may help his Sleep Apnea." (App. 43a) (Upper case in the original)

Thereafter Grubb consulted Dr. Henry G. Raroque, Jr., M. D., (App. 60a-65a) for treatment for his sleep apnea who provided a letter to Southwest stating: "Herbert Grubb is a patient in our clinic. He has been advised to work the aft. shift (5:30 p. m. to 11 p. m.) only." (App. 48a) and confirmed that he sent this letter

directly to Southwest. (App. 67a) Mr. Grubb personally requested that he work a particular shift to accommodate his condition upon recommendation of his physician. (App. 51a)

No accommodation by way of a set shift was ever provided for simulator training or office hours even though Mr. David Colunga, his immediate supervisor had offered Grubb, "If you need your schedule adjusted, whatever you need to get this taken care of, just tell us. . . ." (App. 75a)

A June 9, 2004, "fact finding" meeting among David Colunga, Mr. Robert Torti, (Southwest's Flight Operations Training Director) Mr. Jim Evans, (Grubb's union representative) and Mr. Grubb concluded with the understanding that Grubb would apply for FMLA leave to treat his sleep apnea. (App. 70a)

Grubb himself approached Monica O'Neill, Southwest's FMLA coordinator. (App. 44a) to secure FMLA leave and received "Employer's Notice of Family and Medical Leave Act Status" from Southwest with the assigned Southwest FMLA case number of 1323987. (R. 911).

In the district court David Colunga averred: "I terminated Mr. Grubb on June 21, 2004. Attached hereto as Exhibit N is a true and accurate copy of Mr. Grubb's termination letter. I set forth the reasons for Mr. Grubb's termination in this letter, namely his behavioral problem of falling asleep at work." The timing of the termination on June 21, 2004, was contrary to the Southwest Collective Bargaining Agreement which requires a decision on the "Fact

Finding" within seven (7) days of the June 9, 2004 Fact Finding.

II. THE DECISION OF THE DISTRICT COURT

In disposing of Mr. Grubb's FMLA claim, the District Court applied the *McDonnell-Douglas Corporation v Green. 411 U. S. 792* burden shifting protocol and concluded:

> Grubb has failed to establish a prima facie case of discrimination, . . . Grubb claims that Southwest terminated his employment because he filed a FMLA claim. On the other hand, Southwest maintains that it terminated Grubb's employment due to his "poor performance and behavioral problems. . . . Grubb has not proven that Southwest's reasons for terminating him were pretexts for discrimination. (App. 31a).

In disposing of Mr. Grubb's ADA claim the District Court required Grubb to utilize the *McDonnell-Douglas Corporation v. Green, id.* burden shifting protocol and concluded:

> From the undisputed facts in the record, the court concludes that Grubb could not perform the essential functions of his job, and that Southwest reasonably accommodated Grubb's condition.
>
> Southwest maintains that it discharged Grubb not because of his disability, but because of his poor productivity and his violation of workplace conduct rules. . . . Grubb has not demonstrated

that Southwest's articulated reasons are false, much less that they are pretexts for disability discrimination. (App. 29a-30a)

Grubb filed a Motion to Alter or Amend Judgment where he attempted to dispel the notion that his FMLA interference claim was a discrimination claim on June 15, 2007. The motion to alter or amend was denied without opinion on July 17, 2007. (App. 17a).

III. THE DECISION OF CIRCUIT COURT OF APPEALS

In his appeal to the Fifth Circuit, Grubb indicated the following issues for review.

1. Is the burden-shifting protocol of *McDonnell-Douglas Corporation v. Green, 411 U. S. 792* appropriately applied in an FMLA interference claim where the claimant does not specifically allege retaliation or discrimination?

2. May an employer lawfully rationalize terminating an employee for poor performance when he seeks Family Medical Leave Act leave to treat the very same serious medical condition which entitles him to FMLA leave?

3. Does failure to plead "undue hardship" waive an employer's right to defend a "failure to provide reasonable accommodation" ADA claim?

4. Is the burden-shifting protocol of *McDonnell-Douglas Corporation v. Green, 411 U. S. 792* appropriately applied in a "failure to provide

reasonable accommodation" claim under the American With Disabilities Act?

5. May an employer which is subject to FAA regulations governing flight training which never rejected the FAA mandated work product of an employee legitimately rationalize "poor performance" as a grounds for claiming that the employee is not a qualified individual under the Americans With Disabilities Act?

6. Does an employer fairly articulate a legitimate reason for discharging an employee when the discharge violated the terms of a collective bargaining agreement?

In affirming the District Court:

A. The circuit court shifted the burden of rebutting Southwest's nondiscriminatory reason for terminating him under the progeny of *McDonnell-Douglas v. Green*, i. e., *Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).*

> Yet, even if Grubb can show a *prima facie* case, SWA has the opportunity to articulate--though not necessarily prove, *see Burdine, 450 U.S. at 250*--a legitimate nondiscriminatory reason for its action. Grubb must then rebut this articulation by providing enough evidence to create a genuine issue of material fact that discrimination was nevertheless present. *See Richardson, 434 F.3d at 333*. It is on these post-prima *facie* elements where Grubb's

claim for FMLA retaliation ultimately fails. (App. 13a-14a)

B. In disposing of the issue of whether or not an employer lawfully rationalize terminating an employee for poor performance when he seeks Family Medical Leave Act leave to treat the very same serious medical condition which entitles him to FMLA leave, circuit court concluded:

> Moreover, at least for purposes of the FMLA--if not the ADA--one can be fired for poor performance even if that performance is due to the same root cause as the need for leave. *See McBride v. CITGO Petroleum Corp., 281 F.3d 1099, 1108 (10th Cir. 2002)* (observing that "the FMLA does not protect an employee from performance problems caused by the condition for which FMLA leave is taken"). (App. 16a)

C. The circuit court ignored the fact that Southwest did not plead "Undue Hardship" as an affirmative defense. Instead it accepted Southwest's rationalization for failing to provide Grubb with a reasonable accommodation by way of a fixed shift citing, " SWA's training director testified, without any evidence to the contrary, that the request would impose inordinate burdens on other SWA employees and require SWA to "fundamentally alter" its schedules." (App. 10a) It thus required Grubb to refute an affirmative defense Southwest never asserted in its answer.

D. The circuit court made no reference to the utilization of the *McDonnell-Douglas* protocol by the district court to Grubb's ADA claim. Instead it concluded that Southwest had proven that Grubb was not a qualified individual who was able to perform the duties of his job by determining that *other* accommodations had not enabled him to perform his job.

> Furthermore, given that SWA's repeated offers and provisions of assistance, including time off for treatment, failed to resolve the matter for over a year and a half, the likelihood of further reasonable accommodations rendering Grubb able to do his job is slim. *See Rogers, 87 F.3d at 759-60* ("[R]easonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job . . . ."). Thus, not only is Grubb not a "qualified individual," but SWA also provided any accommodation it may have owed him in any event. (App. 10a)

E. The circuit court ignored the fact that the qualifications for a flight simulator instructor are a governed by federal regulation and that Southwest had repeatedly and consistently accepted Grubb's work product without reporting any deficiency in its flight training/currency program to the FAA due to Grubb's condition and nonetheless found Grubb not to be a qualified individual.

F. The circuit court concluded: "...the district court likely erred when it found that Grubb did not have a *prima facie* (FMLA) case." (App. 13a) but nonetheless found that Southwest had articulated a legitimate reason for discharging Grubb when it violated the applicable collective bargaining agreement, entitling it to summary judgment. (App. 13a)

REASONS FOR GRANTING THE PETITION

I. GRANTING THE WRIT WILL RESOLVE THE ISSUE OF WHETHER OR NOT THE *MCDONNELL-DOUGLASS* BURDEN SHIFTING PROTOCOL IS APPROPRIATE IN THE ABSENCE OF ANY INDICATION THAT CONGRESS INTENDED BURDEN-SHIFTING

Material to this petition is the following language *Mescham v Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2400.(2008) regarding the "five affirmative defenses" to discrimination claims brought under ADEA and the inappropriateness burden shifting absent congressional intent.

> After looking at the statutory text, most lawyers would accept that characterization as a matter of course, thanks to the familiar principle that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Javierre v. Central Altagracia, 217 U.S. 502, 508, 30 S. Ct. 598, 54 L. Ed. 859 (1910)* (opinion for the Court by Holmes, J.); see also *FTC v. Morton Salt Co., 334 U.S. 37, 44-45, 68 S. Ct. 822, 92 L. Ed.*

> *1196, 44 F.T.C. 1499 (1948)* ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . . "); *United States v. First City Nat. Bank of Houston, 386 U.S. 361, 366, 87 S. Ct. 1088, 18 L. Ed. 2d 151 (1967)* (citing *Morton Salt, supra, at 44-45, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499*). That longstanding convention is part of the backdrop against which the Congress writes laws, and we respect it unless we have compelling reasons to think that Congress meant to put the burden of persuasion on the other side. See *Schaffer v. Weast, 546 U.S. 49, 57-58, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005)* ("Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief"). *Mescham v Knolls Atomic Power Laboratory*,128 S. Ct. 2395, 2400.(2008)

Notwithstanding the fact that the *McDonnell-Douglass* burden shifting protocol is not supported by any indication that Congress intended to shift the burden of persuasion from those employers who claim exceptions by way of affirmative defenses to both FMLA and ADA discrimination cases, *McDonnell-Douglass* has spawned considerable burden-shifting progeny. The circuit court below applied one such burden shifting protocol in disposing of Grubb's FMLA case:

> Based on the foregoing, the district court likely erred when it found that Grubb did not have a

prima facie case. Yet, even if Grubb can show a *prima facie* case, SWA has the opportunity to articulate--though not necessarily prove, *see Burdine, 450 U.S. at 250*--a legitimate non-discriminatory reason for its action. Grubb must then rebut this articulation by providing enough evidence to create a genuine issue of material fact that discrimination was nevertheless present. *See Richardson, 434 F.3d at 333*. It is on these post-prima *facie* elements where Grubb's claim for FMLA retaliation ultimately fails.

First, there is no doubt that SWA met its burden of simply articulating a legitimate non-discriminatory reason for its decision--*i.e.*, performance. *See Hicks, 509 U.S. at 509* (noting that the defendant's burden is production, not proof, and "involve[s] no credibility assessment"). (App 13a-14a)

II. GRANTING THE WRIT WILL RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER OR NOT BURDEN SHIFTING IS PROPERLY APPLIED TO FMLA INTERFERENCE/ENTITLEMENT CLAIMS

The circuit courts are split on the application of the McDonnell-Douglass burden-shifting protocol to FMLA interference/entitlement claims.

The Seventh Circuit's decision in *Rice v. Sunrise Express, 209 F.3d 1008, 2000 U.S. App. LEXIS 6295, 140 Lab. Cas. (CCH) P34,036; 46 Fed. R. Serv. 3d (Callaghan) 929*, (Cert Denied) *531 U.S. 1012; 121 S. Ct. 567; 148 L. Ed. 2d 486; 2000 U.S. LEXIS 7815; 69*

U.S.L.W. 3363; *6 Wage & Hour Cas. 2d (BNA) 1120,* allowing an employer to defeat the claim of an employee who was denied the benefits of FMLA leave to simply articulate, not prove, that the employee would have been terminated regardless:

> If the employer wishes to claim that the benefit would not have been available even if the employee had not taken leave, the employer must submit evidence to support that assertion. When that burden of going forward has been met, however, the employee must ultimately convince the trier of fact, by a preponderance of the evidence, that, despite the alternate characterization offered by the employer, the benefit is one that falls within the ambit of *sec. 2614(a)(1)*; the benefit is one that the employee would have received if leave had not been taken. For instance, if the employer claims that the employee would have been discharged or that the employee's position would have been eliminated even if the employee had not taken the leave, the employee, in order to establish the entitlement protected by *sec. 2614(a)(1)*, must, in the course of establishing the right, convince the trier of fact that the contrary evidence submitted by the employer is insufficient and that the employee would not have been discharged or his position would not have been eliminated if he had not taken FMLA leave. *Id. at 1018.*

In deciding the instant case, the Fifth Circuit followed the lead of the Seventh Circuit.

But the Tenth Circuit has acknowledged the conflict:

> The Circuits are split on the issue of where such a burden falls. The Eleventh Circuit, relying on *29 C.F.R. § 825.216 (a) (1)*, has required that once an employee proves she was denied reinstatement after FMLA leave, the employer must prove she would have been laid off anyway for some other reason. *See O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349 (11th Cir. 2000)*; *Parris v. Miami Herald Publ'g Co., 216 F.3d 1298 (11th Cir. 2000)*. This regulation was promulgated by the Department of Labor pursuant to the Secretary's delegated power to issue regulations necessary to carry out the FMLA. *Ragsdale v. Wolverine World Wide, Inc., 152 L. Ed. 2d 167, 122 S. Ct. 1155, 1159-60 (2002)* (citing *29 U.S.C. § 2654*). The First Circuit has held unequivocally that such regulations are entitled to deference:
>
> > We do not write on a clean slate. The Act delegates to the Secretary of Labor broad authority to "prescribe such regulations as are necessary to carry out" the Act. *29 U.S.C. § 2654*. The regulations . . . were promulgated pursuant to the requirements of notice-and-comment rulemaking under the Administrative Procedure Act, *5 U.S.C. § 553*. . . . The regulations were an exercise of the Secretary's delegated authority and were adopted with the participation of the public, and thus deference to the Secretary's interpretation is properly

invoked. *Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 5 (1st Cir. 1998).*

Subsection (a) of *29 C.F.R. § 825.216* provides:

> An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. *An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.* (emphasis added).

This section further provides, by way of example, that

> if an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off . . . . *An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.* (emphasis added). *29 C.F.R. § 825.216(a)(1).*

We therefore conclude that the regulation is not arbitrary, capricious, or manifestly contrary to the FMLA. We also conclude that the regulation

validly shifts to the employer the burden of proving that an employee, laid off during FMLA leave, would have been dismissed regardless of the employee's request for, or taking of, FMLA leave. We therefore see no need to apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* We cannot agree with the Seventh Circuit's reading of the statute as stated in *Rice, 209 F.3d 1008.* We are persuaded that the Eleventh Circuit in *Parris* has the better argument because its reading of the regulation is more natural, and its holding is both more reasonable and more harmonious with precedent. *Smith v. Diffee Ford-Lincoln-Mercury, Inc. 298 F.3d 955, 2002 U.S. App. LEXIS 15280, 146 Lab. Cas. (CCH) P34,556; 83 Empl. Prac. Dec. (CCH) P41,159* (Cert denied.....)

See also,

See also, *Colburn v. Parker Hannifin / Nichols Portland Div., 429 F.3d 325, 331 (1st Cir. 2005)*

The Fourth Circuit candidly acknowledges the existence of the conflict and has declined to resolve it. *Yashenko v. Harrah's NC Casino Co., LLC, 446 F.3d 541, 549 (4th Cir. N.C. 2006)*

III. GRANTING THE WRIT WILL RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER OR NOT THE *MCDONNELL-DOUGLASS* BURDEN-SHIFTING PROTOCOL IS PROPERLY APPLIED TO ADA REASONABLE ACCOMMODATION CASES

Grubb did not plead an ADA discrimination case. Considering what appeared to be "off the shelf" arguments in support of an employer's motion for summary judgment in an ADA discrimination case, the district court nonetheless applied the *McDonnell-Douglass* protocol to Grubb's ADA claim for Southwest's failure to provide him with a reasonable accommodation for his sleep apnea; a fixed shift instead of an ever-changing array of shifts which began and ended at all hours of the day and night.

> Due to the absence of direct evidence of discrimination in this case, Grubb must use the three-step, "indirect" or "pretext" method of proof detailed in *McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*; see also *Daigle v. Liberty Life Insurance Company, 70 F.3d 394, 396 (5th Cir. 1995)*; *Rizzo, 84 F.3d at 762*. In the first step, Grubb must establish a *prima facie* case of discrimination. *McDonnell Douglas, 411 U.S. at 802*. If he produces proof of the elements of a *prima facie* case, a presumption of discrimination arises. See *Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993)*. At the second step, Southwest can rebut this presumption of discrimination by offering a legitimate, nondiscriminatory reason for its

> actions. See *Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).* If Southwest satisfies this burden of production, the *prima facie* case dissolves, and the case proceeds to the third step of the analysis. See *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).* At this third stage, the burden is on Grubb to prove that the reasons offered by Southwest are pretexts for prohibited discrimination. See *id. at 507-08.* (App. 28a) (Footnote omitted)

Burden-shifting in reasonable accommodation cases has been widely repudiated. See *Pebbles v. Potter,* 354 F.3d 761, 765 (8th Cir.2004); *Lenker v. Methodist Hosp.,* 210 F.3d 792, 799 (7th Cir .2002) *Higgins v. New Balance Athletic Shoes, Inc.,* 194 F.3d 252, 264 (1st Cir.1999) *Aka v. Washington Hosp. Center,* 156 F.3d 1284, 1288 (D.C.Cir.1998) (en banc) (adopting the analysis of *Barth v. Gelb,* 2 F.3d 1180, 1186 (D.C. Cir.1993)); *William v. Channel Master Satellite Sys., Inc.,* 101 F.3d 346, 348 n. 1 (4th Cir.1996) *Willis v. Conopco, Inc.,* 108 F.3d 282, 286 (11th Cir. 1997).

Fifth Circuit law required Southwest to plead "undue hardship" as an affirmative defense, *Johnson v. Gambrinus Company/Spoetzl Brewery, 116 F 3d 1052, 1059 (5th Cir. 1997) citing, Riel v. Electronic Data Sys. Corp., 99 F.3d 678 (5th Cir.1996).* Although Southwest never plead "Undue hardship" as an affirmative defense the circuit court concluded that Southwest had articulated that the accommodation sought by Grubb was not reasonable, "SWA's training director testified, without any evidence to the

contrary[1], that the request would impose inordinate burdens on other SWA employees and require SWA to "fundamentally alter" its schedules" (App. 10a) without even considering the absence of evidence of the statutory factors comprising such undue hardship.

It would thus appear that, without saying so, the circuit court applied burden-shifting to Grubb's ADA claim. It allowed Southwest to simply articulate[2] an "undue hardship" defense in its summary judgment motion to Grubb's reasonable accommodation claim (without having pled it) and, because Grubb did not refute that unpled affirmative defense, decided that Southwest was entitled to summary judgment on Grubb's ADA case.

The issue before the circuit court was whether or not Grubb could perform the essential duties of his position if he had been given a fixed shift; not whether other potential solutions had proven effective. The Fifth Circuit failed to credit the fact that Grubb's qualifications to serve as a simulator instructor are established by FAA regulations and the fact that Southwest never rejected his work product, even to the point of passing him on an "in line observation" when he nodded off. It accepted Southwest's assertions that Grubb was not "qualified." The Fifth Circuit made no attempt to determine whether Grubb could

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[1] Evidence that senior Southwest employees, including David Colunga (who personally fired Grubb) offered/suggested the fixed shift as a potential solution to Grubb's sleep apnea contradicted this conclusory allegation.

[2] Southwest made no attempt to prove any of the statutory (42 USC 1211 (10)(B)) factors constituting "undue hardship."

stay continuously awake if he were given a fixed shift and thus "*with* or without reasonable accommodation, can perform the essential functions of the employment position." It decided that since other "accommodations" (which Grubb did not request) were ineffective, "SWA also provided any accommodation it may have owed him in any event," (App. 10a) Grubb was not a "qualified individual" under ADA.

IV. GRANTING THE WRIT WILL RESOLVE THE ISSUE OF WHETHER OR NOT AN EMPLOYER CAN ESCAPE LIABILITY FOR DENYING FMLA LEAVE BY TERMINATING AN EMPLOYEE WHO SEEKS FMLA LEAVE TO TREAT A SERIOUS HEALTH CONDITION THAT MAKES THE EMPLOYEE UNABLE TO PERFORM THE FUNCTIONS OF THE POSITION OF SUCH EMPLOYEE BY MERELY ARTICULATING "POOR PERFORMANCE" WHICH RESULTS FROM THAT CONDITION.

The circuit court below dismissed the possibility that Southwest may have violated Grubb's FMLA rights when it terminated Grubb, determining:

> Moreover, at least for purposes of the FMLA--if not the ADA--one can be fired for poor performance even if that performance is due to the same root cause as the need for leave. *See McBride v. CITGO Petroleum Corp., 281 F.3d 1099, 1108 (10th Cir. 2002)* (observing that "the FMLA does not protect an employee from performance problems caused by the condition for which FMLA leave is taken"). Therefore,

> given that SWA's termination of Grubb was otherwise appropriate, any right to leave would have been extinguished by SWA's exercise of that prerogative. (App. 16a)

However, the circuit court, failed to note that the Tenth Circuit, in elaborating on *McBride*, found 1) that burden to prove, not merely articulate that the employee would have been dismissed even if she had not exercised her FMLA rights is properly upon the employer and 2) that evidence that had the employee remained healthy, the employer would have permitted her to continue indefinitely at her job is sufficient to place the burden upon the employer. See *Smith v. Diffee Ford-Lincoln-Mercury, Inc, supra, at 962.*

Here, it is undisputed that Southwest accepted all of the flight training paperwork that Grubb performed by certifying to the FAA that the instructional sessions were properly completed, despite knowledge that Grubb was suffering from momentary spells of nodding off while conducting these sessions. Senior Southwest personnel believed that Grubb could continue to perform his job if given a fixed shift. Grubb had applied for FMLA leave and was assigned a case number by Southwest. (App. 44a-47a) and Southwest thereafter violated the collective bargaining agreement by terminating Grubb within the time allotted therefore. Grubb therefore presented enough evidence from which a jury could find that he would have continued to be employed at Southwest had he not suffered from sleep apnea. The burden therefore was upon Southwest to prove, not merely articulate, that it would have terminated him in any event.

In a similar circumstances an employee was determined to have a right to FMLA leave for the very condition (severe depression causing the employee to sleep on the job for 10 consecutive days) which was utilized by his employer to rationalize a termination. "Although the ADA applies only to those who can do the job, the FMLA affords those who can't work as a result of a "serious health condition" up to 12 weeks of leave in a year. 29 U.S.C. § 2612(a)(1)(D)." *Byrne v. Avon Products, Inc., 328 F 3d 379, 381 (7th Cir. 2003), Cert denied Avon Prods. v. Byrne* 540 U.S. 881; 124 S. Ct. 327; 157 L. Ed. 2d 147; 2003 U.S. LEXIS 6290; 72 U.S.L.W. 3241; 14 Am. Disabilities Cas. (BNA) 1568; 8 Wage & Hour Cas. 2d (BNA) 1920.

The circuit court has thus emasculated the plain language of the Act by manufacturing a "Catch 22" under which FMLA leave would be totally discretionary with the employer who could arbitrarily decide to terminate the employee upon notice that the employee was suffering from a serious health condition which interferes with the performance of job duties.

CONCLUSION

For 35+ years, qualified employees establishing prima facie cases of discrimination have been required to prove that reasons which employers have merely articulated are pretextural in accordance with the *McDonnell-Douglass Corporation v. Green, 411 U. S. 792* (1973) burden - shifting protocol. When deciding *Mescham v Knolls Atomic Power Laboratory, 128 S. Ct. 2395*, this court has rejected the practice of shifting the burden of persuasion from employers claiming an exception to the practices prohibited by the ADEA to employees. Granting the writ would decide the logical

but collateral issue of the propriety of maintaining the court-made *McDonnell Douglass* protocol for FMLA and ADA cases.

As noted herein, several circuit courts have already repudiated the practice of burden shifting for FMLA interference claims ADA reasonable accommodation claims. The decision of the circuit below is contrary to the greater number of circuit court decisions on this point. Granting the petition will resolve the remaining questions regarding a court-created burden shifting protocol in general and the conflicts about the applicability of burden-shifting to FMLA interference claims and ADA reasonable accommodation claims.

Employers are required to provide FMLA leave to employees who seek leave to treat a serious health condition that makes the employee unable to perform the functions of the position. (See, 29 U. S. C. § 2612 (a)(10(D)) The circuit court below concluded that an employer can, nonetheless escape liability under the FMLA by discharging an employee bu merely articulating the employee is guilty of "poor performance" which is the result of the serious health condition for which leave has been sought. Granting the writ will settle the issue of whether or not an employer can escape the mandate of FMLA by merely articulating that the reason for terminating an employee who seeks/takes FMLA leave was poor performance caused by the same serious health condition for which leave is sought/taken.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-11027

[Filed October 10, 2008]

HERBERT GRUBB	)
	)
Plaintiff - Appellant	)
	)
v.	)
	)
SOUTHWEST AIRLINES	)
	)
Defendant - Appellee	)
	)

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:05-CV-1934

Before DAVIS, CLEMENT, and ELROD, Circuit Judges.

PER CURIAM:

Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

This case concerns claims brought by Herbert Grubb against his former employer, Southwest Airlines ("SWA"), under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 ("ADA"), and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 ("FMLA"). Grubb claims that SWA violated the ADA by firing him rather than accommodating his sleep apnea—which caused him to "nod off" at work—and the FMLA by firing him rather than granting his request for leave. The district court granted summary judgment to SWA on both claims. For the reasons provided below, we affirm.

I. FACTS AND PROCEEDINGS

SWA is a passenger airline company headquartered in Dallas, Texas. In March of 1999, SWA hired Grubb as a flight instructor. In this position, Grubb was required to train pilots through flight simulator and class instruction (with related office hours), and, in so doing, maintain a certain level of expertise by his own training and technique development in instructor meetings and activities. SWA employed Grubb in this post until his firing on June 21, 2004. According to his termination letter, SWA fired Grubb for repeated "sleeping on the job." Grubb does not deny sleeping, but asserts that it was caused by sleep apnea—a condition from which he claims to have suffered since a heart surgery in 2001. Instead of firing him, Grubb claims that SWA should have accommodated him, by FMLA leave or otherwise.

Grubb's work problems first surfaced in December of 2002 when he failed to report to work for several days. Shortly thereafter, Grubb was counseled by a supervisor, David Colunga, about his absences and

also about sleeping during instructor meetings, which Colunga had observed. Grubb reported that "he was on medication and seeking treatment" for the sleep problem. Colunga offered help, but Grubb declined. The sleep problem recurred in March of 2003 in an instructor meeting and in training pilots on a simulator. Grubb was counseled again in a meeting with Colunga, Bob Torti (a training director and supervisor), and Jim Evans (a union representative), and was offered help again—this time, in the form of a referral to SWA's counseling service. SWA requested a diagnosis and prognosis from a doctor, but it appears that Grubb never provided anything more than a conclusory note that "he was being seen for sleep apnea."

As described in the district court's opinion—a description Grubb does not dispute—a pattern of sleeping, both during Grubb's instruction of others and his own training, followed by supervisor meetings and warnings, continued throughout 2003. Although Colunga suggested, near the end of 2003, that there may have been some improvement in the sleeping at work, he suspended Grubb in January of 2004 due to complaints about Grubb's "performance in the [flight] simulator" as well as his appearance and hygiene, which Colunga saw as cause for concern. Despite the warnings, Grubb fell asleep again on February 11, 2004 during a simulated runway approach for his trainees. Grubb was then removed from the training schedule for the rest of the month but encouraged by Colunga to pursue treatment in which Grubb professed interest. The problem recurred on March 4, 2004, when Grubb fell asleep at an instructor meeting. In response to SWA's call for a meeting to discuss the problem again, Grubb asked SWA for a schedule

adjustment to undergo a three and a half week "medical treatment program for [his] sleeping issues." Colunga granted the request. Unfortunately, Grubb fell asleep again at a new hire training program in May of 2004. Colunga, Torti, Evans, and Grubb met again on June 9, 2004 to discuss the ongoing issue.

SWA terminated Grubb's employment on June 21, 2004. Colunga stated in an affidavit: "I terminated Mr. Grubb based on his behavioral problem for the past year and a half. Mr. Grubb had failed to improve his problems after the numerous counseling sessions, offers of schedule adjustments, and offers to take time off." Affidavits from Torti and a third supervisor, Donald Shull, echoed Colunga's concerns and the various grounds for termination. Regarding Grubb's termination, Shull noted that there was a "well-documented history of Mr. Grubb's performance problems . . . [and] [g]iven the fact that [SWA] had given [him] countless opportunities to improve his problem, I believed [SWA] had no other option . . . ." Grubb testified that he understood well in advance that "if the problem continued, . . . it may result in termination." Although Grubb's termination technically violated the collective bargaining agreement by taking place nine, rather than seven, work days after a counseling meeting, it was later affirmed by a tribunal established under that agreement.

Grubb's chief factual contention on appeal appears to be that he "worked quite effectively despite having momentary lapses of nodding off." In support, he cites positive reviews and his apparent compliance with several Federal Aviation Administration ("FAA") regulations. He also argues that he underwent a series

of efforts to treat his "sleep disorder," although his only record citations regarding such efforts are a February 4, 2004 doctor's note authorizing him to work but indicating "manag[ement] [of] his sleep disorder,"and another doctor's note on April 26, 2004 indicating that Grubb "is a patient in our clinic . . . [and] has been advised to work the [afternoon] shift . . . only." Although Grubb claims he requested the afternoon shift, it is unclear what occurred in response. In any event, Torti (the training director) testified that permitting "Grubb to work a set shift schedule would require all the other Flight Instructors to work harder and longer hours than [] Grubb . . . [and] would also require [SWA] to fundamentally alter its established schedule[,] . . . the office day policy[,] and required hours."

Regarding Grubb's request for FMLA leave, the possibility of such leave was first raised by Evans (the union representative) in the last group meeting on June 9, 2004. Colunga asserted in his affidavit, however, that "[d]espite [] Grubb's indication that he would inquire as to FMLA, I decided to terminate [him]." Torti similarly affirmed the absence of any FMLA consideration in the termination decision. After the meeting—but before his firing—Grubb met with SWA's FMLA coordinator, who told him that he would need to submit a medical certification of eligibility to SWA's FMLA administrator to qualify for such leave. Although the process was initiated on June 17, 2004, Grubb never submitted a certification, and the process was terminated on July 7, 2004. Grubb offered no evidence that Colunga or Torti were aware of his application for FMLA leave at the time of his firing.

On September 29, 2005, Grubb filed this action, alleging violations of the ADA, FMLA, Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 ("ERISA"), and Texas wrongful termination law. SWA moved for summary judgment on October 27, 2006. The district court granted SWA's motion in full on June 11, 2007. Grubb only appeals the ADA and FMLA claims.

As to the ADA claim, the district court assumed, for the sake of argument, that Grubb had a "disability" under the statute, but still rejected his claim. Although it is unclear whether the district court considered Grubb's claim to be one for disparate treatment (*i.e.*, he was fired because of a disability) or failure to accommodate (*i.e.*, he was fired because of performance, but that performance was caused by a disability that could have been accommodated), its findings preclude both options. On disparate treatment, the court found that "Grubb has adduced no facts suggesting that a discriminatory reason likely motivated the decision to terminate his employment or that [SWA]'s explanation [of poor productivity and work rule violations] was not credible, *i.e.*, was probably pretextual." *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515–18 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). With regard to accommodation, the court found that "Grubb could not perform the essential functions of his job, and [SWA] reasonably accommodated Grubb's condition," as required under the ADA. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1393–94 (5th Cir. 1993).

As to Grubb's FMLA claim, the district court addressed it as a retaliation, or discrimination, claim rather than a claim for failure to grant leave. As such,

it used the burden-shifting test for indirect evidence discrimination cases that also involve "mixed motives," per *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). *See Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332–33 (5th Cir. 2005) (applying *Desert Palace* to FMLA retaliation in indirect evidence, mixed-motive case). The court found that Grubb failed to offer any evidence of a causal link between his pursuit of FMLA leave and his firing, and that even if he had, he also failed to offer any evidence to rebut the legitimate reasons set forth by SWA.

On appeal, Grubb claims that the district court erred by finding that SWA both met its affirmative duties under the ADA and FMLA, and did not otherwise discriminate against him because of his pursuit of FMLA leave. SWA counters that the district court did not err, and further adds that even if it did, summary judgment would still be proper because Grubb did not suffer from a "disability" or "serious health condition" as required by the ADA and FMLA, respectively.

II. STANDARD OF REVIEW

This court reviews grants of summary judgment *de novo*. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of Law." FED. R. CIV. P. 56(c). This court "may affirm summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision."

Performance Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 853 (5th Cir. 2003).

III. DISCUSSION

A. The ADA Claim

The district court granted summary judgment to SWA on the ADA claim because it found that SWA neither failed in its accommodation duty, because Grubb could not perform the essential functions of his job with or without reasonable accommodation, nor discriminated against Grubb because of his disability. The district court assumed *arguendo* that Grubb had a covered "disability," which the ADA defines in part as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). Because we find that the district court did not err in its dispositive findings, we also assume, without deciding, that Grubb's sleep apnea qualified as a disability.

Under the ADA, a covered employer—and it is undisputed that SWA is one—must provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship . . . ." 42 U.S.C. § 12112(b)(5)(A). A "qualified individual with a disability" is one with a "disability," who, "with or without reasonable accommodation, can [still] perform the essential functions of the employment position that [he or she] holds or desires." *Id.* at § 12111(8). Grubb's challenge fails because he was unable to perform his

job in a manner that SWA could reasonably accommodate. *See Chandler*, 2 F.3d at 1393–94.

Grubb's alleged disability involved a basic element of the performance of his job as a flight instructor, namely being conscious and alert. Lack of physical presence is a commonly-accepted disqualification for ADA protection. *See, e.g., Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996); *Jackson v. Veterans Admin.*, 22 F.3d 277, 279 (11th Cir. 1994); *Amato v. St. Luke's Episcopal Hosp.*, 987 F. Supp. 523, 530 (S.D. Tex. 1997). More to the point, courts have repeatedly approved of ADA-challenged discharges for falling asleep at work, particularly in safety-sensitive positions. *See, e.g., Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000); *Cannon v. Monsanto Co.*, No. 05-5558, 2008WL236922, at *4 (E.D. La. Jan. 28, 2008) (unpublished); *Brown v. Triboro Coach Corp.*, 153 F. Supp. 2d 172, 185 (E.D. N.Y. 2001). It is difficult to fathom how Grubb could instruct future pilots with confidence, or receive training on how to do so, if he was repeatedly "nodding off." Furthermore, in this analysis, "consideration shall be given to the employer's judgment as to what functions of a job are essential." 42 U.S.C. § 12111(8). After eighteen months of counseling and warnings, there could be no reasonable doubt, either to the casual observer or to Grubb, where SWA stood on the matter.

Of course, the inquiry does not stop with Grubb; the court must also look at whether SWA met its accommodation obligations. "It is the plaintiff's burden to request reasonable accommodations." *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2007). The only cited accommodation that Grubb requested

that was not granted was the set shift assignment request reflected in the April 26, 2004 doctor's note. Leaving aside that the note did not specify any condition, but only that Grubb "is a patient in our clinic," SWA's training director testified, without any evidence to the contrary, that the request would impose inordinate burdens on other SWA employees and require SWA to "fundamentally alter" its schedules. *See Foreman v. Babcok & Wilcox Co.*, 117 F.3d 800, 809–10 (5th Cir. 1997) (holding that accommodation does not require imposing disparate burdens on others). Furthermore, given that SWA's repeated offers and provisions of assistance, including time off for treatment, failed to resolve the matter for over a year and a half, the likelihood of further reasonable accommodations rendering Grubb able to do his job is slim. *See Rogers*, 87 F.3d at 759–60 ("[R]easonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job . . . ."). Thus, not only is Grubb not a "qualified individual," but SWA also provided any accommodation it may have owed him in any event.

Turning to the discrimination aspect of the district court's ADA holding, Grubb has conceded any appeal on this ground by repeatedly asserting that his claim is limited to accommodation. Thus, it is unnecessary to proceed further with this aspect of the district court's opinion.

B. The FMLA Claim

In his complaint, Grubb claims that his "wrongful termination violated the [FMLA] in that [he] was an

eligible employee for the leave and benefits under the act and he was seeking to have time to treat a serious medical condition." Treating this claim largely as one for FMLA retaliation or discrimination based on one's status as an FMLA applicant, the district court granted summary judgment to SWA because it found that Grubb did not offer enough evidence of a causal link between any leave and his termination, and he could not rebut the legitimate reasons set forth by SWA for its decision. Grubb focuses his appeal on the argument that the district court used the wrong framework by analyzing his claim as a retaliation rather than entitlement claim. Nevertheless, he appeals the denial of his claim on both retaliation and entitlement grounds. As described below, we find that (1) although the district court may have erred in finding that Grubb did not make out a *prima facie* case on retaliation, it did not err in rejecting his claim because he could not rebut the legitimate reasons for his termination, and (2) any claim to entitlement is also subject to dismissal on summary judgment, whether or not the district court so ruled.

In assessing Grubb's FMLA claim as a claim for leave-based retaliation or discrimination, the district court used a "mixed motive" analysis. That analysis, which permits a finding of discrimination despite the co-existence of legitimate motives, was developed by the Supreme Court in evaluating indirect evidence cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. *Desert Palace*, 539 U.S. at 98–102. It has since been extended by this court to FMLA retaliation cases. *See Richardson*, 434 F.3d at 332–33. It is not clear if Grubb argues for a "mixed motive" analysis or the more restrictive sole motive test of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792

(1973). *See Richardson*, 434 F.3d at 332–33 (using *Desert Palace* for "mixed motive" and *McDonnell-Douglas* for "sole" reason cases). Nevertheless, his claim fails on either theory because although he may be able to show a *prima facie* case, which is required under both tests, he cannot show that leave was a reason for his firing—which is required even under the less restrictive "mixed motive" test. *See id.* at 333.

Under the FMLA, a covered employer—and it is undisputed that SWA is one—may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any [FMLA leave] right," or otherwise "discriminate against any individual for opposing any [FMLA-prohibited] practice." 29 U.S.C. § 2615(a). To survive summary judgment in the pursuit of violations of the foregoing in an indirect evidence case, a plaintiff must first establish a *prima facie* case. As such, he must show: "1) he was protected under the FMLA; 2) he suffered an adverse employment action; and 3) he was treated less favorably than an employee who had not requested leave . . . or the adverse decision was made because he sought protection under the FMLA." *Mauder v. Metro. Transit Auth. of Harris County, Tex.*, 446 F.3d 574, 583 (5th Cir. 2006).

As to the first element of the *prima facie* case, there may be enough of an issue of fact as to whether Grubb had a "serious health condition" for purposes of FMLA "protection" in seeking leave to survive summary judgment. *See Hurlbert v. St. Mary's Health Care Sys.*, 439 F.3d 1286, 1298 (11th Cir. 2006). The regulations provide that a "serious health condition" exists where one has an illness and is under the care of a health care provider after a "period of incapacity" of "more than three days." 29 C.F.R. § 825.114. Although it does

not appear that Grubb's condition was particularly acute when he sought leave or that his FMLA application reached the point of showing how he would use the leave, his apparent three and a half week treatment in March of 2004 (which he claims was a "hospitaliz[ation]") followed by continued physician care may raise an issue of fact. *See Hurlbert*, 439 F.3d at 1298.

Obviously, Grubb suffered an adverse employment action by virtue of his termination. Thus, the only remaining *prima facie* issue is whether his firing "was made because he sought protection under the FMLA." *Mauder*, 446 F.3d at 583. As a *prima facie* element, this third prong is not an ultimate showing of liability, but merely determines whether there is enough evidence to require an employer to respond. *See Burdine*, 450 U.S. at 253–54 (observing that the burden is "not onerous" and only creates a "presumption"). All that is required is "a causal connection between the protected activity and the discharge." *Chaffin v. John H. Carter Co.*, 179 F.3d 316, 319 (5th Cir. 1999). The timing of Grubb's June 21 termination shortly after the raising of his possible pursuit of leave in the June 9 meeting with supervisors is likely sufficient. *See Mauder*, 446 F.3d at 583 (emphasizing "temporal proximity" in the *prima facie* context).

Based on the foregoing, the district court likely erred when it found that Grubb did not have a *prima facie* case. Yet, even if Grubb can show a *prima facie* case, SWA has the opportunity to articulate—though not necessarily prove, *see Burdine*, 450 U.S. at 250—a legitimate non-discriminatory reason for its action. Grubb must then rebut this articulation by providing

enough evidence to create a genuine issue of material fact that discrimination was nevertheless present. *See Richardson*, 434 F.3d at 333. It is on these post-*prima facie* elements where Grubb's claim for FMLA retaliation ultimately fails.

First, there is no doubt that SWA met its burden of simply articulating a legitimate non-discriminatory reason for its decision—*i.e.*, performance. *See Hicks*, 509 U.S. at 509 (noting that the defendant's burden is production, not proof, and "involve[s] no credibility assessment"). Second, the only arguments that Grubb sets forth to assert that SWA acted because of FMLA leave—*i.e.*, a two-day firing delay under the labor agreement and the intervening timing of his application—are insufficient. Failure to follow internal procedures is generally not enough to create a genuine issue of fact as to discriminatory motives. *See Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir. 1993). Further, speculation from the timing of Grubb's FMLA application and his firing is also not enough, particularly in light of an eighteen month record of warnings and performance problems that were understood by Grubb as possibly leading to his termination and the uncontested testimony that SWA's decision to terminate arose independently of FMLA leave. *See Jarjoura v. Ericsson, Inc.*, 266 F. Supp. 2d 519, 531 (S.D. Tex. 2003), *aff'd*, 82 F. App'x 998 (5th Cir. 2003) (unpublished) ("[T]iming alone is not enough to support retaliation . . . ."); *see also Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997) ("[One] cannot merely rely on his subjective belief that discrimination occurred . . . ."). In short, even if Grubb can show that his efforts to seek FMLA leave are protected, he lacks evidence to demonstrate that such efforts led to SWA's decision to fire him.

The final argument on appeal is one that the district court did not address, namely whether Grubb's termination violated the FMLA by effectively denying him leave to which he would have been entitled. Given its finding in support of the firing in general, the district court did not go on to deal directly with any claim to entitlement. Nevertheless, "the FMLA contains two distinct provisions." *Mauder*, 446 F.3d at 580. One—which was explored by the district court and discussed above—is a "proscriptive" provision that "protects employees from retaliation or discrimination for exercising their rights under the FMLA." *Id.* The other is a "prescriptive" provision that "creates a series of entitlements or substantive rights." *Id.* Among these FMLA entitlements is the leave that Grubb sought for his sleep apnea before being terminated. *See* 29 U.S.C. § 2612(a)(1)(D) (providing up to twelve weeks of annual leave for a "serious health condition"). Although there may be an issue of fact as to whether Grubb suffered from a "serious health condition" for the reasons noted above, SWA's otherwise proper termination precludes entitlement to leave.

As a general proposition, "[a]n employee who requests or takes protected leave under the FMLA is not entitled to any greater rights or benefits than he would be entitled to had he not requested or taken leave." *Serio v. Jojo's Bakery Rest.*, 102 F. Supp. 2d 1044, 1051 (S.D. Ind. 2000). This principle is not only reflected in FMLA regulations on reinstatement, *see* 29 C.F.R. § 825.216(a), but is also a matter of common sense. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) (describing as "uncluttered logic" its holding that "an employer who interferes with an employee's FMLA rights will not be liable if the employer can prove it would have made

the same decision had the employee not exercised the employee's FMLA rights"). Moreover, at least for purposes of the FMLA—if not the ADA—one can be fired for poor performance even if that performance is due to the same root cause as the need for leave. *See McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002) (observing that "the FMLA does not protect an employee from performance problems caused by the condition for which FMLA leave is taken"). Therefore, given that SWA's termination of Grubb was otherwise appropriate, any right to leave would have been extinguished by SWA's exercise of that prerogative.

IV. CONCLUSION

For the reasons stated above, we AFFIRM the district court's grant of summary judgment to SWA on both the ADA and FMLA claims filed by Grubb.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:05-CV-1934-G

[Filed July 17, 2007]

HERBERT GRUBB	)
	)
Plaintiff,	)
	)
VS.	)
	)
SOUTHWEST AIRLINES,	)
	)
Defendant.	)
	)

ORDER

Plaintiff's motion (docket entry 99) to alter or amend judgment is **DENIED**.

SO ORDERED.

July 17, 2007.

/s/
A. JOE FISH
CHIEF JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:05-CV-1934-G

[Filed June 11, 2007]

HERBERT GRUBB	)
	)
Plaintiff,	)
	)
VS.	)
	)
SOUTHWEST AIRLINES,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

Before the court is the motion of the defendant Southwest Airlines ("Southwest") for summary judgment. For the reasons set forth below, the motion is granted.

I. BACKGROUND

In March 1999, Southwest hired plaintiff Herbert Grubb ("Grubb") as a flight crew training instructor ("flight instructor"). Oral Deposition of Herbert Grubb

("Grubb Deposition") at 69, *located in* Appendix in Support of Defendant's Motion for Summary Judgment ("Appendix to Motion") at 238; *see also* Plaintiff's Original Petition ("Complaint") at 1. A flight instructor trains pilots in flight simulators and in classrooms in accordance with Federal Aviation Administration and Southwest guidelines. Affidavit of Robert Torti ("Torti Affidavit") ¶ 5, *attached to* Appendix to Motion at 1. Additionally, a Southwest flight instructor must remain current on equipment and instruction techniques by attending monthly instructor meetings, skill practice sessions and critique review sessions, as well as through self study. *Id.* A flight instructor divides his time equally between simulator training and office hours/classroom training. *Id.* ¶ 6.

From December 2002 through June 2004, Southwest staff repeatedly counseled Grubb about behavioral problems, including "nodding off at work while training students in the simulator, during instructor meetings and during office hours; tardiness; and missing office hours." Southwest's Brief in Support of Motion for Summary Judgment ("Motion") at 3. Because of these problems, Southwest encouraged Grubb to seek medical care and offered to him time to do so. *Id.*

On December 3, 4, 16, and 17, 2002, Grubb did not appear at work. Affidavit of David Colunga ("Colunga Affidavit") ¶¶ 4, 5, *attached to* Appendix to Motion at 15; see also *id.*, Exhibit A. On December 18, 2002, David Colunga, Southwest's manager of flight instruction, met with Grubb to discuss Grubb's unexcused absences from work. Colunga Affidavit ¶¶ 4, 5, *attached to* Appendix to Motion at 15; see also *id.*, Exhibit B. Colunga told Grubb that he had noticed

Grubb fall asleep during instructor meetings. *Id.* In response, Grubb explained that he was taking medication and was seeking treatment for the problem. *Id.*

In March 2003, Southwest requested a diagnosis and prognosis from Grubb's physician. Torti Affidavit ¶ 10, *attached to* Appendix to Motion at 2. During that meeting on March 10, 2003, Grubb admitted that he had a problem and was under medical care. *Id.*; *see also* Colunga Affidavit, Exhibit C, *attached to* Appendix to Motion at 26. Colunga again offered his assistance and recommended that Grubb contact Southwest's counseling service. *Id.* In a memorandum memorializing that meeting, Colunga wrote that "[w]hile I was impressed with his attitude concerning acknowledgment of his problem, I must remember that he has been counseled in the past on these very problems, we have seen no improvement so far." Colunga Affidavit, Exhibit C, *attached to* Appendix to Motion at 26.

In a letter dated May 8, 2003, Colunga wrote Grubb the following.

> On March 10, 2003, you, Jim Evans, Bob Torti, and myself had a meeting to discuss your sleeping problem. In that meeting as you recall, we asked for a diagnosis and a prognosis from your doctor. In addition, we strongly recommended that you get involved with the "Clear Skies" program, and we gave you their phone number at that meeting.
>
> To date, we have not seen any improvement in your sleeping problem, and you have

> disregarded the requests we made at our March 10, 2003 meeting. You are still falling asleep and snoring in meetings, even during presentations given by different Southwest Airlines Vice Presidents. Additionally, you have fallen asleep during numerous simulator and ground school training events. This behavior calls the integrity of Southwest Airlines training into question, and could result in fines to the Company.
>
> Herb, you have been counseled on this matter numerous times by the prior management and by myself no less than 3 times since the end of 2002. This letter is to officially notify you that if we see no changes with your sleeping problem or a lack of compliance with our policies, we will take action to suspend you without pay until you have taken the action necessary to fix your problem.
>
> This letter will be placed in your file. Acceptance of this letter only signifies that you have read it and in no way implies that you agree or disagree with the contents.

Colunga Affidavit, Exhibit D, *attached to* Appendix to Motion at 27.

In a memorandum dated August 13, 2003, Colunga reported the following.

> On August 13 it was reported to me that . . . Grubb had fallen asleep during a Proficiency Training event. . . .

> [D]uring the time that . . . Grubb fell asleep, the Pilots vectored themselves onto the final approach and then went missed approach. During the missed approach, they shook the simulator around to see if they could wake him. This attempt failed and eventually Herb did wake up on his own. . . .

Colunga Affidavit, Exhibit E, *attached to* Appendix to Motion at 28.

In a memorandum dated November 11, 2003, Colunga reported a conversation with Grubb regarding Grubb's poor hygiene. Colunga told Grubb that he expected Grubb to "shower daily, wear deodorant, wear pressed trousers and a nice, clean shirt." Colunga Affidavit, Exhibit F, *attached to* Appendix to Motion at 29. Colunga also observed that Grubb seemed to be "doing better with his sleeping problem." *Id.*

However, in a letter dated January 14, 2004, Colunga suspended Grubb for two weeks due to the fact that Grubb had fallen asleep numerous times in a PT on January 10, 2004, and noted that Grubb's appearance and poor hygiene were a "distraction." Colunga Affidavit, Exhibit G, *attached to* Appendix to Motion at 30.

In a memorandum to Grubb dated January 30, 2004, Colunga welcomed Grubb back to work but issued the following warning.

> Our Flight Crew Training Instructors perform safety sensitive duties and must be able to give their full attention to our Pilots while conducting training. This cannot be done if the

> Instructor is sleeping or dosing [sic]. As we do with all Instructors, we will continue to monitor your performance to ensure that you are properly performing the duties of an Instructor.

Colunga Affidavit, Exhibit H, *attached to* Appendix to Motion at 31.

On February 10, 2004, supervisor Don Shull ("Shull") observed Grubb asleep in a simulator. Colunga Affidavit, Exhibit J, *attached to* Appendix to Motion at 33; see also *id.*, Exhibit I, *attached to* Appendix to Motion at 32 ("At one point he told the Trainees to prepare for an approach to a certain runway, and as he turned to change the runway in the simulator, he dozed off again never changing from the original runway."). He was then removed from the training schedule for the remainder of the month. *Id.* On February 11, Colunga met with Grubb. *Id.*, Exhibit I, *attached to* Appendix to Motion at 32. Grubb stated that he would like to see a specialist in Miami, and Colunga encouraged Grubb to do so. *Id.*; see also *id.*, Exhibit J, *attached to* Appendix to Motion at 33.

On March 4, 2004, Grubb fell asleep behind Colunga numerous times in a monthly instructor meeting. *Id.*, Exhibit K, *attached to* Appendix to Motion at 34. According to Colunga, he "had to reach over and shake [Colunga] more than once during the meeting to reawaken him." *Id.*

On March 11, 2004, Southwest held a fact finding meeting to discuss Grubb's sleeping problem. *Id.*, Exhibit L, *attached to* Appendix to Motion at 35. On March 12, 2004, Grubb informed Southwest that, effective immediately, he was beginning a three and

one-half week sleep apnea medical treatment program. *Id.*, Exhibit M, *attached to* Appendix to Motion at 36. Nevertheless, during May 2004, Grubb fell asleep in a new hire training meeting. *Id.*, Exhibit N, *attached to* Appendix to Motion at 37.

On June 21, 2004, Southwest terminated Grubb's employment. *Id.* According to Shull, Grubb "nodd[ed] off during instructor meetings and during office days, [but] [b]efore his termination, Southwest gave him every opportunity to address the lapses and nodding off, but the behavior continued." Affidavit of Donald Shull ("Shull Affidavit") ¶ 10, *attached to* Appendix to Motion at 40.

On June 15 and June 17, 2004, Grubb approached Monica O'Neill, Southwest's coordinator of Family and Medical Leave Act ("FMLA") benefits. Affidavit of Monica O'Neill ("O'Neill Affidavit") ¶¶ 2, 5, *attached to* Appendix to Motion at 45-46. O'Neill explained Southwest's FMLA procedures to Grubb. O'Neill Affidavit ¶ 6, *attached to* Appendix to Motion at 46. That is, O'Neill would provide Southwest employees with a FMLA application and then call Broadspire, Aetna's administrator. *Id.* ¶ 3, *attached to* Appendix to Motion at 45. Broadspire, in turn, would open a file, assign a claim number, and deliver that claim number to O'Neill. *Id.* After that, O'Neill had no further involvement in the case unless the employee had a question about the application process. *Id.* Ultimately, Broadspire would notify O'Neill as to whether an employee's application was approved. *Id.* Southwest is not authorized to determine if an employee is eligible for FMLA benefits. Affidavit of Mary Masal ("Masal Affidavit") ¶ 7, *attached to* Appendix to Motion at 50. O'Neill informed Grubb that he needed to deliver a

medical certification to Broadspire. O'Neill Affidavit ¶¶ 3, 6, *attached to* Appendix to Motion at 45-46. After that, O'Neill had no further contact with Grubb. *Id.* ¶ 7. On June 17, 2004, Broadspire opened a file on Grubb. Masal Affidavit ¶ 8, *attached to* Appendix to Motion at 50. On July 7, 2004, Broadspire canceled Grubb's claim after it did not receive Grubb's medical certification. *Id.* As a result, Broadspire did not approve Grubb's application for FMLA benefits. *Id.* Grubb never filed for long term disability benefits. Affidavit of Gina Del Rosario ("Del Rosario Affidavit") ¶ 7, *attached to* Appendix to Motion at 52.

On September 29, 2005, Grubb filed this suit, alleging that Southwest (1) violated the Americans with Disabilities Act ("the ADA"), 42 U.S.C. § 12101, *et seq.*, by discharging him because of his disability and failing to make reasonable accommodation to his disability; (2) violated the Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601, *et seq.*, by denying him leave and benefits; (3) deprived him of benefits under Southwest's employee benefit plan, in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140; and (4) wrongfully terminated him in violation of Texas state law. Complaint at 2-3. Southwest now moves for summary judgment on all of Grubb's claims.

II. ANALYSIS

A. Evidentiary Burdens

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P.

56(c).[1] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. See *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Id.* at 323-24. To carry this burden, the opponent must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Instead, he must show that the evidence is sufficient to support a resolution of the factual issue in his favor. *Anderson*, 477 U.S. at 249. All of the evidence must be viewed, however, in a light most favorable to the motion's opponent. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is properly entered against the opponent if after adequate time for discovery, he fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

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[1] The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

B. ADA Claim

The ADA prohibits discrimination in employment against qualified persons with a disability. *Dupre v. Charter Behavioral Health Systems of Lafayette Inc.*, 242 F.3d 610, 613 (5th Cir. 2001); *see also* 42 U.S.C. § 12112(a). To establish a *prima facie* case under the ADA, Grubb must prove (1) that he has a disability within the meaning of the ADA; (2) that he was qualified for his job; and, (3) that an adverse employment decision was made solely because of his disability. *Zenor v. El Paso Healthcare System, Limited*, 176 F.3d 847, 852-53 (5th Cir. 1999); *Hamilton v. Southwestern Bell Telephone Company*, 136 F.3d 1047, 1050 (5th Cir. 1998); *Turco v. Hoechst Celanese Corporation*, 101 F.3d 1090, 1092 (5th Cir. 1996). Such proof may be established either by direct evidence or by indirect evidence using the burden-shifting regimen established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The ADA defines the term "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Grubb must also establish that the impairment, if it existed as perceived, would be substantially limiting. *McInnis v. Alamo Community College District*, 207 F.3d 276, 281 (5th Cir. 2000); see also *Deas v. River West, L.P.*, 152 F.3d 471, 475-76 (5th Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999) and *cert. denied*, 527 U.S. 1044 (1999).

To establish a violation of the ADA, Grubb must show "that (1) [ ]he has a disability; (2) [ ]he was qualified for the job; and (3) an adverse employment

decision was made solely because of [his] disability." *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996); see also *Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1024 (5th Cir. 1999). Due to the absence of direct evidence of discrimination in this case,[2] Grubb must use the three-step, "indirect" or "pretext" method of proof detailed in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973); see also *Daigle v. Liberty Life Insurance Company*, 70 F.3d 394, 396 (5th Cir. 1995); *Rizzo*, 84 F.3d at 762. In the first step, Grubb must establish a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. If he produces proof of the elements of a *prima facie* case, a presumption of discrimination arises. See *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). At the second step, Southwest can rebut this presumption of discrimination by offering a legitimate, nondiscriminatory reason for its actions. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If Southwest satisfies this burden of production, the *prima facie* case dissolves, and the case proceeds to the third step of the analysis. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). At this third stage, the burden is on Grubb to prove that the reasons offered by Southwest are pretexts for prohibited discrimination. See *id.* at 507-08.

Southwest argues that "nodding off" is not a recognizable impairment. Motion at 10. For the

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[2] Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. See *Mooney v. Aramco Services Company*, 54 F.3d 1207, 1217 (5th Cir. 1995); *Brown v. East Mississippi Electric Power Association*, 989 F.2d 858, 861 (5th Cir. 1993).

purpose of deciding this motion, however, the court will assume *arguendo* that, at all relevant times, Grubb suffered from a "disability" within the ADA's definition of that term. To meet his initial burden under *McDonnell Douglas*, however, Grubb must still provide competent evidence that he was qualified for his position, and that Southwest discharged him because of his disability.

To determine whether a plaintiff is otherwise qualified for a given job, the court must conduct a two-part inquiry. First, it must determine whether the plaintiff could perform the essential functions of the job, *i.e.*, functions that bear more than a marginal relationship to the job at issue. Second, if the court finds that the plaintiff is not able to perform the essential functions of the job, it must determine whether any reasonable accommodation by the employer would enable him to perform those functions. See *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993) (citing *Chiari v. City of League City*, 920 F.2d 311, 315 (5th Cir. 1991)), *cert. denied*, 511 U.S. 1011 (1994); see also *Jenkins v. Cleco Power LLC*, No. 05-30744, __ F.3d __ , 2007 WL 1454363, *5 (5th Cir. May 18, 2007). From the undisputed facts in the record, the court concludes that Grubb could not perform the essential functions of his job, and that Southwest reasonably accommodated Grubb's condition.

Southwest maintains that it discharged Grubb not because of his disability, but because of his poor productivity and his violation of various workplace conduct rules. The burden lies with Grubb to show that he is otherwise qualified. See *Turco*, 101 F.3d at 1093; *Chandler*, 2 F.3d at 1394. Grubb has adduced no

facts suggesting that a discriminatory reason likely motivated the decision to terminate his employment or that Southwest's explanation was not credible, *i.e.*, was probably pretextual. See *Hicks*, 509 U.S. at 515-18; *Burdine*, 450 U.S. at 256. Grubb's subjective belief that he was a victim of discrimination is insufficient, without further evidentiary support, to overcome Southwest's articulation of a legitimate, non-discriminatory motive for terminating him. *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Grubb initially did not respond to Southwest's motion for summary judgment on his ADA claim but ultimately filed a supplemental statement regarding his ADA claim after Southwest filed its motion for summary judgment. *See* Supplemental Memorandum, filed on March 8, 2007. Nevertheless, Grubb is unable to recover under the ADA because he has not identified any evidence from which a reasonable factfinder could conclude that Southwest discriminated against him on the basis of his disability. Southwest has produced substantial evidence supporting its claim that its decision to discharge Grubb was based on legitimate, nondiscriminatory reasons. See *Burdine*, 450 U.S. at 253. Grubb has not demonstrated that Southwest's articulated reasons are false, much less that they are pretexts for disability discrimination. *Hicks*, 509 U.S. at 507-08; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000). Grubb's bare speculation and subjective belief that Southwest terminated him because of his disability are not sufficient to support a claim for disability discrimination. See *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc) ("It is more than well-settled that an employee's subjective belief that he suffered an

adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion. . . ."). It is thus apparent that Grubb has adduced no evidence that would authorize a reasonable fact-finder to find, at a trial, that he was the victim of discrimination when Southwest terminated his employment. Thus, Southwest is entitled to summary judgment on Grubb's ADA claim.

C. FMLA Claim

Enacted in 1993, the FMLA sought to meet the needs of families while accommodating the legitimate interests of employers. *Bocalbos v. National Western Life Insurance Company*, 162 F.3d 379, 382 (5th Cir. 1998) (citing 29 U.S.C. § 2601(b)(3)), *cert. denied*, 528 U.S. 872 (1999). To achieve this goal, the FMLA allows eligible employees working for covered employers to take temporary leave for medical reasons, for the birth or adoption of a child, and for the care of a spouse, child, or parent who has a serious health condition. *Id.* (citing 29 U.S.C. §§ 2601(b)(1), 2601(b)(2)). Under its prescriptive and proscriptive provisions, the FMLA provides two methods of recovery. 29 U.S.C. § 2612(a)(1) (setting forth entitlement to FMLA leave), 2614(a) (providing right to restoration to same or equivalent position upon return from FMLA leave), 2615(a) (prohibiting interference with employee's exercise of FMLA rights). Prescriptively, an eligible employee is granted the right, under certain circumstances, to take up to 12 work-weeks of leave in a 12-month period. 29 U.S.C. § 2612(a)(1). Upon return from his FMLA leave, the employee is entitled to immediate restoration to the same position, or its equivalent, that he occupied prior to leave. *Haley v.*

Alliance Compressor LLC, 391 F.3d 644, 649 (5th Cir. 2004). If an employer should deny the employee these rights, that employer has violated the FMLA's entitlement provision, and recovery is permitted. See *Porch v. Dillard's Inc.*, 2004 WL 1809813, at *6 (N.D. Tex. Aug. 12, 2004). Proscriptively, the FMLA contains prohibitions against penalizing an employee for the exercise of FMLA rights. 29 U.S.C. § 2615(a); see also *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 763 (5th Cir. 2001); *Porch v. Dillard's Inc.*, 2004 WL 1809813, at *8 (N.D. Tex. Aug. 12, 2004) (FMLA protects employees from being discriminated or retaliated against because they have exercised their rights under the FMLA).

When there is no direct evidence of discriminatory intent and the employee maintains that discrimination was the sole reason for his discharge, the burden-shifting regimen established in *McDonnell Douglas* outlined above is utilized to analyze a plaintiff's FMLA claim. *Richardson v. Monitronics International, Inc.*, 434 F.3d 327, 332-33 (5th Cir. 2005). However, in cases in which an employee claims that discrimination was a motivating factor -- but not the sole factor -- for his termination, the court utilizes a mixed-motive framework analysis. That is,

> (1) the employee must make a *prima facie* case of discrimination; (2) the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action; and (3) the employee must offer sufficient evidence to create a genuine issue of fact either that (a) the employer's proffered reason is a pretext for discrimination, or-and herein lies the modifying distinction-(b) that the employer's reason,

> although true, is but one of the reasons for its conduct, another of which was discrimination. If the employee proves that discrimination was *a* motivating factor in the employment decision, the burden again shifts to the employer, this time to prove that it would have taken the same action despite the discriminatory animus. The employer's final burden "is effectively that of proving an affirmative defense."

Id. (footnotes omitted).

Grubb has failed to establish a *prima face* case of discrimination. Grubb merely points to the timing of his termination and the filing of his FMLA claim. Even if it is assumed *arguendo* that Grubb had made a *prima facie* case, his claim would fail because he did not create a "genuinely contested issue of material fact" with respect to Southwest's "legitimate, non-discriminatory reason for dismissing" him. See *Burton v. Buckner Children and Family Services, Inc.*, 104 Fed. Appx. 394, 396 (5th Cir. 2004), *cert. denied*, 543 U.S. 1050 (2005). Grubb claims that Southwest terminated his employment because he filed a FMLA claim. On the other hand, Southwest maintains that it terminated Grubb's employment due to his "poor performance and behavioral problems." Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment at 5. Grubb has not proven that Southwest's proffered reasons for terminating Grubb's employment were pretexts for discrimination.

D. ERISA Claim

Grubb avers that Southwest terminated his employment for the purpose of depriving him of

benefits under Southwest's employee benefit plan, in violation of ERISA Section 510. ERISA provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ." 29 U.S.C. § 1140. To recover under this section, Grubb "need not show that 'the *sole* reason for his . . . termination was to interfere with pension rights'; however, the plaintiff must show that the employer had the 'specific intent to violate ERISA.'" *Clark v. Resistoflex Company*, 854 F.2d 762, 770 (5th Cir. 1988) (quoting *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987)) (emphasis in original).

Under Section 510 of ERISA, Grubb must first establish a *prima facie* case that Southwest discharged him with a specific discriminatory intent to prevent attainment of benefits to which he would have become entitled under the plan. 29 U.S.C. § 1140; *Stafford v. True Temper Sports*, 123 F.3d 291, 295 (5th Cir. 1997). "The plaintiff in such an ERISA employment discrimination test need not prove that the discriminatory reason was the only reason for discharge, but he must show that the loss of benefits was more than an incidental loss from his discharge, and this inference of discrimination can be proven by circumstantial evidence." *Stafford*, 123 F.3d at 295. If Grubb can establish his *prima facie* case of discrimination, then Southwest must articulate a non-discriminatory reason for its actions. *Id.* If Southwest succeeds in doing so, then the burden shifts back to Grubb to demonstrate that Southwest's explanation is

nothing more than pretext, and that the real purpose he was fired was to deny him benefits governed by ERISA. *Id.*

To establish a *prima facie* case, Grubb must show that Southwest had the specific intent to violate ERISA when it terminated him. *Unida v. Levi Strauss & Company*, 986 F.2d 970, 980 (5th Cir. 1993). Grubb's complaint alleges that he was discharged to prevent his benefits from vesting under Southwest's ERISA plan. Complaint at 2-3. He did not respond to Southwest's motion for summary judgement on his ERISA claim. Grubb cannot survive Southwest's motion for summary judgment merely by resting on the allegations in his pleadings. See *Celotex*, 477 U.S. at 324. "[W]hile [Grubb is] entitled to have reasonable inferences drawn in [his] favor, the inferences to be drawn must be rational and reasonable, not idle, speculative, or conjectural." *Unida*, 986 F.2d at 980 (internal quotations omitted). It would be speculative to infer, on the basis of Grubb's proffered evidence, that Southwest intended to interfere with Grubb's entitlement to pension benefits. See *id.* The summary judgment record contains no evidence of any specific intent on the part of Southwest to prevent Grubb from obtaining ERISA benefits. Without sufficient evidence to support a finding that Southwest had the specific intent to deprive Grubb of benefits under ERISA, the court need not address the question of whether Southwest's stated reason for terminating Grubb was pretextual. See *Clark*, 854 F.2d at 771 ("[W]here the only evidence that an employer specifically intended to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth evidence sufficient to separate that intent from the myriad of other possible reasons for which an

employer might have discharged him.") (footnote omitted).

E. Wrongful Termination Claim

Southwest argues that the ERISA exception to the well-pleaded complaint rule applies, so that Grubb's state law claim for wrongful termination is superseded by the ERISA preemption provision. Motion at 44. Grubb did not respond to Southwest's motion for summary judgment of his wrongful termination claim. In his complaint, however, Grubb claims that Southwest wrongfully terminated his employment to avoid paying him retirement and pension benefits. Complaint at 3. According to Southwest, this claim arises under ERISA because Grubb's prayer for past and future pension rights implicates benefits protected by ERISA. Motion at 44. A state law claim addressing the right to receive benefits under an ERISA plan necessarily "relates to" to ERISA and is thus preempted. *Dorn v. International Brotherhood of Electrical Workers*, 211 F.3d 938, 948 (5th Cir. 2000). Consequently, Grubb has not stated a viable claim for wrongful termination. See *Herring v. Oxy Vinyls L.P.*, No. H-05-0719, 2005 WL 1653076, *3 (S.D. Tex. July 08, 2005).

III. CONCLUSION

For the reasons stated, Southwest's motion for summary judgment is **GRANTED**.

SO ORDERED.

June 11, 2007.

/s/
A. JOE FISH
CHIEF JUDGE

APPENDIX D

Excerpt from Plaintiff's Original Petition

* * *

[p.2]

had to cease dozing in the work place. Plaintiff attempted counseling, psychologist, psychiatrist. However, none of these attempts worked, Plaintiff's involuntary napping during the normal working daily hours persisted.

III.

In June of 2004, Mr. Grubb pursuant to the Family Medical Leave Act requested leave to go to Florida to be treated by a specialist in the field of sleep apnea. After Plaintiff submitted his request to leave under Family Medical Leave Act, Defendant wrongfully terminated Plaintiff's employment. Defendant's wrongful termination violated the Family Medical Leave Act in that Plaintiff was an eligible employee for the leave and benefits under the act and he was seeking to have time to treat a serious medical condition. Defendant's conduct of termination was done gross disregard to Plaintiff's rights under the Family Medical Leave Act codified in 29 U.S.C. §2612(a)(1)(D). For which Plaintiff seeks damages.

IV.

The decision to terminate Plaintiff in June of 2004, and not attempt reasonable accommodation for Plaintiff's medical condition of severe sleep apnea violated the Americans with Disability Act. Plaintiff medical or physical condition of sleep apnea caused limitation on Plaintiff's major life activities. Plaintiff had requested to be transferred to another department for Defendant and Defendant declined to consider this transfer. Further Defendant refused to allow Plaintiff leave to have his condition treated by a national medical authority on Plaintiff's condition. Defendant's refusal to consider reasonable accommodation for Plaintiff amounts to a violation of the American with Disability Act codified at 42 U.S.C. § 12112.

V.

Defendant's decision to terminate Plaintiff in June of 2004, was done in part to preclude Plaintiff from utilizing his rights and benefits through the pension system in place and to which Plaintiff would have been entitled. §510 of the Employee Retirement Income Security Act of 1974 (ERISA) makes it unlawful for an employer to discharge, discipline an employee for the

* * *

APPENDIX E

EXHIBIT A

INSTRUCTOR FLIGHT SIMULATOR
OBSERVATION FORM

DATE: 2/10/04
INSTRUCTOR: Herb Grubb EMPLOYEE#: 49892
OBSERVER: Don Shull EMPLOYEE#: 16019

TYPE TRAINING

☐ INITIAL/DAY ☐ PROFICIENCY (PT)
☐ UPGRADE/DAY ☐ HGS/DAY__
☒ OTHER: CPT#3 (Sim1)

OVERALL COMMENTS

CPT #3 was flown in Sim #1. Normal CPT3 profile was not flown from PHX to LAS. Both students seemed advanced for CPT#3, so Herb used a modified standard SLC PT profile instead. Briefing was thorough on SMGCS, aircraft towing to start box, pink spots, stop bars, etc. HGS symbology discussed in detail as were AIII callouts. The CPT period was run with full motion and visual: Herb demonstrated Apnea lapses 13 times in 4 hours (most were 5-8 seconds in duration with one lasting 35-40 seconds).

SPECIFIC COMMENTS

PREPARATION

Well prepared, thorough briefing.

BRIEFING

ATTITUDE: Excellent attitude, very enthusiastic about subject (SMGCS and CAT III approaches)

TRAINEE INTERACTION: Excellent interaction by instructor and students.

USE OF TRAINING AIDS: Mainly white erase board and JEPPS.

TECHNICAL KNOWLEDGE

Superb!

SIMULATOR PROFILE

Standard SLC profile (slightly modified) with low vis taxi/takeoff, steep turns, 3 stalls, LNAV holding, direct intercept, etc. CAT III approaches to 16L & 34R with missed approaches at 50' and APRCH WARN's at a 200-300 ft AGL. VDR approaches were flown to Rwy 30L at HDU. Both students flew V. cuts with engine relights. CPT profile PHX/LAS not flown, but all items on that profile (LNAV, holding direct intercepts etc. accomplished.

IOS OPERATION

Worked panel well, in spite of numerous Apnea lapses which were normally short in duration (5-8 seconds) with only one lasting in excess of 30 - seconds (35-40). Did not miss any problems students had during the period.

FOTM COMPLIANCE

Covered items normal CPT3 (PHX/LAS) has in it plus airwork V. cuts and multiple approaches by using PT profile. However, Herb did use the period as a simulator (full motion and visual) Vs. standard CPT profile guidance.

NOTE WORTHY AREAS

His instructional capabilities and interaction with his students.

SUGGESTED IMPROVEMENTS

While Herb did not miss anything his students were doing, his numerous short Apnea relapses (5-8 seconds usually) do need to get under control before continuing with students.

DEBRIEFING TECHNIQUES

Recaped the period in about 45 minutes. Answered all questions the students had. Discussed visual techniques for landing out of an offset approach with nothing but REILS and no VASI.

INSTRUCTOR DEBRIEFING

Talked about his Apnea problem for 30 minutes after students left. I suggested he might want to work in Program Development because of his computer skills and his overall talent for instruction and his systems knowledge. I mentioned that getting on a regular sleep schedule vs shifting schedule may help his Sleep Apnea problem also.

NST. SIGNATURE_____

OBSERVER SIGNATURE /s/ Donald B. Shull

SWAGRUBB 000199 - 200
USCA5 505 - 506

APPENDIX F

CASE # 1323481

SOUTHWEST AIRLINES
EMPLOYER'S NOTICE OF FAMILY AND MEDICAL LEAVE STATUS

Date: 6-17-04 ☐ Check here if California based

ORIGINAL TO EMPLOYEE
☐ COPY TO EMPLOYEE'S MEDICAL FILE
To: Herb Grubb Emp.# 49892
From: Monica O'Neill Title: Flight Crew Instructor

WHAT TYPE OF LEAVE IS THIS?

☒ MEDICAL ☐ OJI ☐ FAMILY MEMBER (parent, child, spouse)

Time used for paid or unpaid medical leave of absence, paid workers' compensation leave, and personal leave of absence for family medical reasons or to care for a child after birth, adoption or foster care will be designated FMLA and run concurrently, if qualified.

We are notifying you of your status regarding Family and Medical leave (FMLA) due to:

☒ A serious health condition that makes you unable to perform the essential functions of your job, or

☐ The birth of your child, or the placement of a child with you for adoption or foster care, or

☐ A serious health condition affecting your ☐ spouse, ☐ child under 18, ☐ parent for which you are needed to provide care.

You are: ☐ not eligible for FMLA and this leave will not be counted against your FMLA leave.

☒ eligible for 480 hours of FMLA leave for the period of leaving beginning _____ , pending receipt of the application and certification of Physician/Practitioner to the Company's Representative (Broadspire, formerly Kemper), and it will be your responsibility to verify and track the availability/usage of your FMLA hours.

☐ not qualified for FMLA entitlement on _____ but will be qualified on _____.

If approved for FMLA, this leave will be counted against your FMLA leave entitlement. You will be required to cooperate with the Company or the Company's Representative in any FMLA inquiry.

Your health benefits must be maintained during any period of unpaid FMLA leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave provided that you have complied with all Federal requirements under the Family and Medical Leave Act of 1993 during the qualified FMLA leave of absence.

You will be required to furnish medical certification of a serious health condition. You must furnish appropriate certification to the Company's Representative (Broadspire) by 1-1-04 (must be within 15 calendar days) after you are notified of the requirement or we may delay the start of your leave until the certification is submitted. The Company's Representative may contact the treating provider, with permission, for purposes of clarification and authenticity of the medical certification. Please note that the attendance control policy for your workgroup will be in force until the Company's Representative has approved your FMLA application.

You will be required to furnish periodic reports as requested by the Company or the Company's Representative of your status and intent to return to work. If no advance notice is provided by the Employee and none is given during the leave, the Employee has 2 calendar days after returning to work to tell the Company he/she requests the leave be designated as FMLA leave.

You may use accrued, unused sick or vacation pay for unpaid FMLA leave for your own serious health condition. If the purpose of the leave is to care for or provide support for an eligible family member and not your own serious health condition, you *will* be required to use vacation days available, then the remainder of the leave will be unpaid. Non-revenue travel for you and your eligible dependents and working at another job are not permitted while using FMLA without prior written permission, unless the Guidelines for Leaders, "Your Guide to Southwest Airlines Employee Pass & Travel Privileges", and/or the applicable collective bargaining agreement provide otherwise.

You will be required to present a fitness-for-duty certificate (doctor's note) prior to being restored to employment. If such certification is required but not received, your return to work may be delayed.

If the circumstances of your leave change and you are able to return to work earlier than the date indicated, you should notify the appropriate person that you are able to return to work, so that any necessary scheduling adjustments can be made.

Important

If you normally pay a portion of the premiums for your health insurance, any premiums that were not collected from you prior to or during a Family and Medical Leave of Absence will be collected from your paycheck upon your return to work. If you have any questions regarding your health care coverage or payment of premiums, you should call the People Service Center at 1-800-551-1211.

Revised February 2004

APPENDIX G

North Texas Neuroscience Center

Henry G. Raroque, Jr., M.D.
Clinical Associate Professor
Department of Neurology
UT Southwestern Medical Center

American Board of Psychiatry & Neurology
American Board of Clinical Neurophysiology
ABPN Special qualifications in Clinical Neurophysiology
American Board of Sleep Medicine

4/26/04

To whom it may concern,

Mr Herbert Grubb is a patient in our clinic. He has been advised to work the aft. shift (5:30 PM to 11 PM) only.

Sincerely,

H. G. Raroque, Jr.

BAYLOR MEDICAL CENTER AT IRVING
2001 N. MACARTHUR BLVD. SUITE 700A
IRVING TEXAS 75061

BAYLOR HEALTH CENTER AT IRVING-COPPELL
440 W. INTERSTATE 635, SUITE 234

IRVING TEXAS 75063

BAYLOR GRAPEVINE CAMPUS
1010 W. INTERSTATE 114, SUITE 310
GRAPEVINE, TEXAS 76051

METRO (972) 869-3448 FAX (972) 869-9913

Henry G. Raroque, Jr. M.D.-00040

USCA5 609

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DISTRICT

CIVIL ACTION NO. 3:05-CV-1934-G

[Dated August 15, 2006]

HERBERT GRUBB,
Plaintiff

v.

SOUTHWEST AIRLINES
Defendant.

DEPOSITION EXCERPT OF MR. GRUBB

* * *

[p.137]

spells that we've talked about, were there particular shifts that were more difficult to work or you had more nodding off issues?

A. I wasn't aware it was happening.

Q. Okay. As it relates to what folks were telling you about, were there particular shifts that were more difficult with increased nodding off?

A. Not that I'm aware of.

Q. Okay. So it happened randomly throughout all the shifts that you were working on; is that correct?

A. I don't know that it was happening.

Q. Okay. But based off what the employees were telling you, it was happening throughout all the shifts; is that correct?

A. That's what I was told by Mr. Colunga, yes.

Q. Okay. Did you ever make a request that you work a particular shift in accommodation of your episodes or spells?

A. Yes.

Q. And why did you do that?

A. Because the doctor recommended that I stay on a set schedule.

Q. Okay.

A. He wrote a note to that effect.

Q. Okay. What shift did you make your

* * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DISTRICT

CIVIL ACTION NO. 3:05-CV-1934-G

[Filed November 7, 2006]

HERBERT GRUBB, Plaintiff

v.

SOUTHWEST AIRLINES Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

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Raroque's Report 7 April 04, para. Impression(3)). Dr. Raroque recognized in addition that Plaintiff's CPAP machine was probably inadequate for the treatment of Plaintiff's condition of obstructive sleep apnea because of Plaintiff's weight gain. (Pl. App., p. 82, Raroque's Report 7 April 04, para. Impression(3)). Plaintiff

condition of morbid obesity was not medically addressed until December 29, 2005. (Pl. App., p. 136-137, p. 139, Aff. of Dr. Prieto, para. 2 & 6); (Pl. App., p. 107, Aff. of Grubb, para. 8). Plaintiff's symptoms associated with the obstructive sleep disorder were not relieved until Plaintiff's morbid obesity was medically addressed and Plaintiff's weight significantly reduced. (Pl. App., p. 139, Aff. of Dr. Prieto, para. 6); (Pl. App., p. 102, Aff. of Grubb, para. 8).

Plaintiff's medical chronological of events associated with his history of obstructive sleep apnea and morbid obesity starts shortly after being released by his physicians for the heart surgery in April of 2001. On June 11, 2001, Plaintiff was seen by Dr. Horn for the followup on the coronary disease and reassessment of chest pain. (Pl. App., p. 25, Grubb Dep. Ex. 5). Dr. Horn on June 11, 2001, diagnosed Plaintiff with sleep apnea and morbid obesity. (Pl. App., p. 25, Grubb Dep. Ex. 5). On June 11, 2001, Plaintiff had not made an appointment with Dr. Viroslav for management of Plaintiff's sleep apnea. (Pl. App., p. 25, Grubb Dep. Ex. 5). Plaintiff felt he was sleeping well and had not experienced or had any reports up to June 11, 2001, concerning any symptoms associated with his condition of obstructive sleep apnea. (Pl. App. p. 100, Aff. Of Herbert Grubb, para. 2). Plaintiff recalls receiving complaints associated with Plaintiff's falling asleep while talking to a co-worker or associate after January of 2002. (Pl. App. p. 100, Aff. Of Herbert Grubb, para. 2).

Plaintiffs weight in April of 2001 was only 220 pounds, however by April 1, 2002, Plaintiff's weight had increased to 339 pounds. (Pl. App., p. 40, Med. Aff. of Dr. Henderson's office, Oct. 13, 2005, para. Social

Hist.); (Pl. App., p. 101, Aff. of Grubb, para. 3). By April 1, 2002, Plaintiff's condition of morbid obesity had significantly worsen and the symptoms associated with the condition of obstructive sleep apnea had significantly worsen. Plaintiff was

[p.6]

experiencing symptoms from falling asleep during inappropriate times. During the period around April of 2002, Plaintiff was being told by friends and acquaintances that he was falling asleep in the middle of casual conversations and also it was being reported to Plaintiff that he was falling asleep at work. The complaints about falling asleep at work included during training session with pilots on the simulator. (Pl. App., p. 101, Aff. of Grubb, para. 3). During most of the incidences in which Plaintiff had been told by observers that he had fallen asleep, Plaintiff was not aware that he was asleep or had fallen asleep.

On April 1, 2002, Plaintiff was advised to call Dr. Viroslav's office to set up an appointment with either Dr. Viroslav or one of his partners for management of his symptoms associated with obstructive sleep apnea. (Pl. App., p. 26, Grubb Dep. Ex. 6, para.); (Pl. App., p. 101, Aff. of Grubb, para. 5). Plaintiff contacted Dr. Viroslav's office, Southwest Pulmonary Associates, LLP, and was assigned Dr. Fernando Torres for treatment and management of Plaintiff's condition of obstructive sleep disorder. In June of 2002, Dr. Torres had a formal sleep study performed on the Plaintiff. As a result of the formal sleep, Plaintiff was advised that he would need to wear a CPAP machine at night to relieve the symptoms of obstructive sleep disorder. (Pl. App., p. 28, Grubb Dep. Ex. 7); (Pl. App., p. 101 - 102,

Aff. of Grubb, para. 6). Plaintiff wore the CPAP machine each night as instructed by Dr. Torres. However, Plaintiff did not receive or experience any relief from the symptoms of obstructive sleep disorder such as waking up at night gasping for air. (Pl. App., p. 102, Aff. of Grubb, para. 7). Plaintiff continued receiving complaints from acquaintances that he was falling asleep during inappropriate times and associated with the complaints Plaintiff often found that he was waking up at night gasping for oxygen. (Pl. App., p. 102, Aff. of Grubb, para. 7). It was medically confirmed by Dr. Raroque in his April 7, 2004, medical narrative that Plaintiff's CPAP machine was clinically observed to be ineffective or inadequately treating Plaintiff's condition of obstructive sleep disorder. (Pl. App., p. 82, Raroque's Report 7 April 04, para. Impression(3)).

Sometime around December of 2002, Mr. David Colunga, Plaintiffs supervisor,

[p.7]

counseled Plaintiff concerning his sleeping during instructor's meeting. (Def. App., p. 16, para. 5). Plaintiff explained to Mr. Colunga that he was receiving medical treatment for his problem of sleeping during inappropriate times. (Pl. App., p. 102-103, Aff. of Grubb, para. 10). In March of 2003, Mr. Colunga counseled Plaintiff in the presence of Bob Torti and Jim Evans concerning Mr. Colunga's observation of Plaintiff falling asleep during instructor's meeting and falling asleep during training pilots in the simulator. (Def. App., p. 16, para. 6). Plaintiff during the meeting with Mr. Colunga in March explained that he had been diagnosed with the condition of sleep apnea and as a

result was receiving medical treatment to address the problem.

Plaintiff saw Dr. Torres on May 21, 2003, concerning Plaintiff's obstructive sleep disorder. Plaintiff followed Dr. Torres' instructions concerning the wearing of the prescribed CPAP machine each night after May 21, 2003. (Pl. App., p. 102, Aff. of Grubb, para. 9). Despite Plaintiff's compliance with medical instructions concerning the wearing of the CPAP machine Plaintiff was not experiencing any relief from the symptoms of oxygen deprivation at night during sleep. (Pl. App., p. 102, Aff. of Grubb, para. 9). Dr. Torres confirms that Plaintiff was still experiencing symptoms consistent with obstructive sleep disorder. (Pl. App., p. 29, Grubb Dep. Ex. 8, para. Problems). Simultaneously with the frequency of events of waking up at night from oxygen deprivation, Plaintiffs weight had increased from 339 pounds as reported on April 1, 2002 to over 350 pounds by May 21, 2003. See (Pl. App., p. 26, Grubb Dep. Ex. 6) and (Pl. App., p. 29, Grubb Dep. Ex. 8, para. Physical Examination). Mr. Grubb as of May 21, 2003, had not been placed on any medical program which addressed his morbid obesity or weight gain. (Pl. App., p. 102, Aff. of Grubb, paras. 8 & 9). Dr. Torres addressed the problem associated with Plaintiff increased weight gain by ordering the CPAP machine to be titrated as an adjustment for Plaintiff's weight gain. (Pl. App., p. 29, Dep. of Grubb, Ex. 8). On May 21, 2003, Dr. Torres did not address Plaintiff's weight gain or at any time thereafter with a medical referral for the weight gain or present Plaintiff with a medical plan to reduce Plaintiff's obesity. (Pl. App., p. 102, Aff. of Grubb, para. 9).

[p.8]

In March of 2004, Plaintiff on the advise of Mr. Colunga, enrolled in the Clear Skies program and was admitted into the hospital at Harris Methodist Hospital for diagnosis under the care of Cathal Grant, M.D. for treatment of depression and sleep disorder. (Pl. App., p. 31, Grubb Dep. Ex. 10). While enrolled under the Clear Skies Program, Plaintiff was given an appointment to see Dr. Raroque concerning his episodes of falling asleep at inappropriate times. (Pl. App., p. 103, Aff. of Grubb, para. 13). In April of 2004, Dr. Raroque performed a number of tests but had not given an explicit diagnosis as to why Plaintiff's current treatment was not working. Dr. Raroque's tests confirmed and documented that the CPAP machine was not relieving Plaintiff from the symptoms of sleep apnea. (Pl. App., p. 33, April 7, 2004, Dr. Raroque Report, para. Impression (3)). Dr. Raroque medical opinion was the CPAP machine was inadequate for treatment of Plaintiff's obstructive sleep disorder because of Plaintiff's weight gain. (Pl. App., p. 33, April 7, 2004, Dr. Raroque Report, para. Impression(3)).

On June 9, 2004, Plaintiff requested family medical leave. (Pl. App., p. 104, Aff. of Grubb, para. 15). During the fact finding meeting on June 9, 2004, concerning Plaintiff's recent episodes with falling asleep at work while training pilots on the flight simulator, Plaintiff requested the opportunity to exercise leave under the Family Medical Leave Act. (Pl. App., p. 104, Aff. of Grubb, para. 15). Persons present at the June 9, 2004, fact finding meeting were Plaintiff's immediate supervisor, Dave Colunga, Dave Colunga's immediate supervisor, Bob Torti, and the union representative, Jim Evans. (Pl. App., p. 104, Aff.

of Grubb, para. 15). Mr. Colunga testified on August 24, 2004, at the conclusion of the fact finding meeting he and management concluded the meeting with telling Plaintiff to look into leave under FMLA. (Pl. App., p. 125, Excerpt of Hearing Board of Adjustments, p. 53, 1. 14-24). Plaintiff contacted Monica O'Neill, person in charge of application and approval for leave with Southwest Airlines Co. On June 17, 2004, Ms. O'Neill assigned Plaintiff a case number and a deadline of July 1, 2004, to have the leave request form filled out by Plaintiff's physician and returned to Southwest Airlines Co. (Pl. App., p. 104, Aff. of Grubb, para. 16); (Pl. App., p. 108, Ex. "B" to Aff. of

* * *

USCA5 779 - 782

APPENDIX J

Cathal P. Grant, M.D., P.A.
RETURN TO WORK/SCHOOL AUTHORIZATION

USCA5 822

[*Fold-out exhibit, see next page*]

RETURN TO WORK/SCHOOL AUTHORIZATION

Martin D. Fisher, M.D., P.A.
Sharon Boyd, RN, PMHNP
Mary Jo Ferley, PhD., RN, PMHNP
Cathal P. Grant, M.D., P.A.
Gloria Simpson, RN, PMHNP
Sharon Wallace, RN, PMHNP
Hadi R. Tejani, M.D., P.A.
Susan Boyer, RN, PMHNP
1604 Hospital Pkwy., Suite 507 • Bedford, TX 76022
817/354-7269

DATE 2/5/04

This is to certify that Herbert Gruble

has been under my care and is able to return to work / school

on ____________________

Remarks: We are in the process of treating Mr. Gruble for clinical depression & managing his sleep disorder to ↓ falling asleep quick. Med changes in progress.

C.P. Grant

Physician Signature

Form 16652 (11/03)

(61)

DEPOSITION EXHIBIT 10 Gruble

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APPENDIX K

Deposition Exhibit 12

North Texas Neuroscience Center

Henry G. Raroque, Jr., M.D.
Clinical Associate Professor
Department of Neurology
UT Southwestern Medical Center

American Board of Psychiatry & Neurology
American Board of Clinical Neurophysiology
ABPN Special qualifications in Clinical Neurophysiology
American Board of Sleep Medicine

April 7, 2004

James Kravetz, MD

Re: Herbert Grubb

Dear Dr. Kravetz:

Thank you for the opportunity to evaluate your patient, Herbert Grubb. As you recall, he is a 47-year-old right-handed Caucasian male who has a peculiar history of spells and sleep disturbance.

In essence, the patient dates his history three years ago when he had a heart attack and underwent bypass

surgery. Since that time, he has had problems with symptoms.

In essence, he has spells. He would mention that in the meaning would drop his head off for a few seconds or a few minutes and will continue conversations. He apparently is fully aware of what is going on. The people have described him as perhaps being sleepy. He easily doze off in different places.

This is of course seen in the setting of diagnosis of sleep apnea performed about two to three years ago after the heart attack. He does not know his pressures and I do not have the original diagnostic study. He apparently tries to use the machine, still snores, has mouth breathing, takes them out in the middle of the night and actually sleeps better. He denies any leg jerking of leg discomfort, but at times may have cramping sensation in the lower extremities. He has gained about 100 pound since the heart attack.

He also describes other spells including sensation of awakening perhaps once a week in the morning and perhaps being half asleep between 5 or 7, standing up or sitting in chair, feeling like he has been picked up and thrown to the ground. He actually falls to ground during that time. It is not passive feeling of being limp. Fortunately, he has not injured himself during those times. He also describes since that time cognitive impairment which are mainly word finding difficulty. He denies any deterioration in terms of short-term memory and the like. He works as an instructor for pilots and also works on the computer. In the computer, he sleeps a lot more.

He was thoroughly evaluated and has had conflicting diagnosis of depression or no depression. In any case, he even ended up going to an inpatient setting. He has been given in the last two weeks, Zoloft 100 mg a day and Wellbutrin 200 mg a day. In the last month, he has also been given Provigil and the last week, Ambien 10 mg a day. He claims that the later two drugs may have helped him, particularly with his cognition.

When queried, he denies any head or neck injuries, new medication uses, intercurrent illnesses, nutritional supplementations, and the like.

PMH: High blood pressure and high cholesterol. He is on atenolol in the last year and Lipitor.

SR: Aside from the above, it is negative for chest pains, palpitations or dyspnea, bladder or bowel disturbance, gait difficulty, and focal motor sensory deficits involving the extremities.

FH: Negative neuromuscular or neurologic conditions.

PSH: He is married, but his wife is not available to help us out. He has two children. He smokes but he did not note how much. Does not drink alcoholic beverages or abuse recreational drugs. He is a flight instructor.

GDH/MOH: Noncontributory.

PE: Reveals very pleasant cooperative gentlemen who appears his stated age. Not in any acute cardiopulmonary stress, BP 130/100, PR 88, and RR 20. He was severely overweight for his height of 6'3". No craniocervical bruits, normal temporal artery

pulsations, palpation of the head and neck without any significant tenderness. He has crowed oropharynx.

NE: Details of his complete neurological examination are available and in summary, that were nonfocal. His mental status, cranial nerve, motor, reflex, sensory, gait Romberg, meningeal, and cerebellar testing were nonrevealing.

Impression:

1. Spells,
    a. Possible automatic behavior.
    b. Less likely, but cannot rule out cataplexy like attacks.
    c. Less likely seizures, but cannot be sure. It is not clear whether they are spells or part of the same process or different entities altogether. He gives various descriptions at this time. He certainly needs a workup in that regard. Whether there is psychological issues or not is not clear, but he is not striking he is having depression at this time.
2. Cognitive impairment, which is not obvious in this visit.
    a. I doubt that this represents a degenerative condition.
    b. This may be remnants of his previous cardiac surgery.
    c. This still may indeed represent seizures.
    d. This may be an after effect of the sleep disturbance.
3. Sleep disturbance,
    a. Documented OSA. He certainly has an inadequate treatment with noted snoring even with a CPAP and him having mouth breathing. Either way, I believe that this

may be inadequate particularly seen in the setting of weight gain.

b. Possible primary hyersomnolent state, but I still doubt at this time. He is already on Provigil of course. As a workup, he needs a CPAP retitration procedure. I would like to do an MSLT, but first we have to treat his sleep apnea adequately. He was advised regarding weight loss and sleep hygiene.

4. He said to have history of depression, but this did not strike as such. He has already been on medications for the last week. We will observe how he does. It is interesting that the Provigil and Ambien has helped him more. Of course, there may be psychological and psychophysiologic mechanisms for his sleep disruption and daytime function also. We will look at this from different prospectus.

I had a very, very long discussion with Mr. Grubb. He deserves full workup with the symptoms that he is giving us. We need to do an MRI of the head, carotid Doppler, and an EEG. We will also do CPAP retitration procedure. Depending on the results, we may need to a formal neurocognitive testing. I am giving her a sleep calendar and a spell calendar. He will call us for any untoward events. I spoke about safety and driving on a somnolent condition. I spoke about social recreational drug restrictions accord to the Texas Law.

Again, thank you very much for allowing me to participate in his care. I will keep you apprised of his progress.

Best personal regards,

Henry G. Raroque, Jr., M.D.
DICTATED BUT NOT READ

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APPENDIX L

North Texas Neuroscience Center

Henry G. Raroque, Jr., M.D.
Clinical Associate Professor
Department of Neurology
UT Southwestern Medical Center

American Board of Psychiatry & Neurology
American Board of Clinical Neurophysiology
ABPN Special qualifications in Clinical Neurophysiology
American Board of Sleep Medicine

April 26, 2004

James Kravetz, MD

Re: Herbert Grubb

Dear Dr. Kravetz:

I saw Mr. Grubb today. Since last seen, he had an EEG, which is normal. His Carotid Dopplers were been negative. Unfortunately, he could not stand the MRI lying down and as such, it has not been used. Since last seen, he was given Ambien, which he claims has helped him to some degree in the daytime. He still has the unusual behavior.

We again went through his sleep pattern and he mentions that he does shift work. He is usually at

night going to bed around 2 or 3 and waking up at around 9. However, his work schedule has been disruptive enough that he cannot get a **rhythm to some degree**, but his best time is working around 5:30 in the afternoon up to 11, which is one of the shifts that he works in. We wonder if that is contributory.

In any case, his symptomatology is otherwise identical. His examination today does not reveal any new lateralizing findings of consequence. His BP is 140/100. The rest were unchanged.

Impression:

1. Spells, which may be of different etiology, but I cannot rule out a sleep-related phenomenon. We will first focus on that and if it does not help (including automatic behavior or cataplexia-like attacks), we may need to do a prolonged EEG.
2. Cognitive impairment, same plan as above.
3. Sleep disturbance,
   a. OSA. He is scheduled for a CPAP retitration in the next week.
   b. Possible circadian rhythm disorder including shift work disorder with insufficient sleep and a delayed sleep phase syndrome.
   c. I cannot rule out a primary hypersomnolent state at this time as yet. We may consider an MSLT depending on his course.
4. History of depression, which he claims is stable.
5. Polypharmacy, which he claims is helpful.

I had a very, very long discussion with Mr. Grubb. He will maintain a spell calendar and a sleep calendar. I wrote a letter for his employer to give him a more regular shift to see if a better scheduling time will help

him in the long term. He will call us for any untoward events.

Again, thank you very much for allowing me to participate in his care. I will keep you apprised of his progress.

Best personal regards,

Henry G. Raroque, Jr., M.D.

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USCA5 870

APPENDIX M

Excerpt Transcript of David Colunga
8/24/2004

* * *

[p.53]

operations and I talked to him about that and he let me know what had gone on during his simulator period.

Q. Okay. And John Cushman again is who?

A. He's a new hire pilot with Southwest Airlines.

Q. Okay. And you say you observed him falling asleep as well?

A. Not in the simulator.

Q. Oh.

A. John Cushman saw him falling asleep in the simulator and Sean McGehee saw him in the simulator.

Q. Okay. Did you do --

A. Rod Jones saw him falling asleep in the simulator.

Q. Did you hold any type of meeting with Herb?

A. Yes, I called for a fact finding and we sat down, had a fact finding in the conference room with -- present with Herb, Jim Evans, Bob Torti and myself.

Q. Do you recall what was discussed at the fact finding meeting?

A. Yeah. I mean, we kind of let Herb know we're kind of at the end of the road here. We're being put in a corner. That was when Jim Evans suggested the FMLA. And, you know, we kind of left the meeting with saying look into that.

Q. Okay. What was the result of the fact finding

[p.54]

meeting, what did you decide?

A. Eventually I decided to terminate Herb.

Q. What did you base your decision on?

A. Well, just looking back into the past year and a half or so in working with this problem and dealing with counseling sessions and suspensions and offers of help and offers of schedule adjustments and offers to go see medical people and having him call Clear Skies and, I mean, you know, short of myself going to medical school, I don't know what else I could have done.

Q. Okay. Now, you mention that Jim Evans suggested FMLA?

A. Right.

Q. Why not just let Herb do the FMLA?

A. I don't know. Jim took the ball and ran with it. You know, and started doing all the leg work for Herb. He got a hold of people in flight ops, he got a hold of people at the training center. Whoever, needed -- he gave us a report late that evening on what he had done so far as far as trying to get this done for Herb.

Q. Okay. My question is though: Why discharge him if --

A. Well, that's not part of it. It's -- it's just going back over everything, just back, back, back, back.

* * *

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APPENDIX N

Excerpt Transcript of David Colunga
8/24/2004

* * *

[p.108]

resign, correct?

A. I did, yes.

Q. And he refused to resign, correct?

A. He did.

Q. And the you terminated him?

A. That's correct.

Q. And you gave -- I believe the back page of this exhibit is on June 21st, Herb's termination letter?

A. That's correct.

Q. Okay. And at the time that you terminated him on June 21st, were you aware that he had begun the -- he had filled our the FMLA paperwork, he had been assigned a case number by Southwest, and he was essentially under -- or in the process of getting his FMLA leave approved?

A. No, I was not. I knew he was chasing down the paperwork, but as far as -- as far as what was going on, where they were in the process, no.

Q. Okay. In the meantime, between the June 8th meeting and the June 21st meeting, did you ever talk to Jim Evans about what the status was of Herb's FMLA paperwork?

A. I may have asked him once, I don't recall.

Q. Okay. Will you agree with me that by firing Herb you prevented him from taking his FMLA leave?

[p.109]

A. Yeah.

Q. Do you believe that Herb's medical condition that caused him to nod off prevents him from performing his job in a simulator and certifying the pilots?

A. We don't certify, we train.

Q. Okay.

A. So yes.

MR. CARR: I'm going to -- I'm sorry, I'm going to object to the characterization that this is a medical issue. He's already testified he's not a doctor and he just knows from what Herb told him it was sleep apnea. He's defining it as a medical issue, but this is not a doctor here who is testifying.

BOARD MEMBER RYAN: I understand.

BOARD MEMBER EVANS: Both of us.

MR. STANTON: Can you read -- I'm sorry, can you read back the last question and answer.

(Requested portion read back.)

Q. (By Mr. Noble) Explain to me why it is pilots comes in for this training. Are they required to do it under FAA guidelines or the FAA rules?

A. They are required to do it by our -- our training program.

Q. Okay.

A. Yes.

* * *

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APPENDIX O

Excerpt Transcript of David Colunga
8/24/2004

A. Yes. Herb came into my office, became very emotional. I came out from behind my desk, sat next to him, I put my arm around his shoulder. I said, Herb, whatever you need from us, let us know. If you need your schedule adjusted, whatever you need to get this taken care of, just tell us. . . . (Excerpt of System Board of Adjustment Hearing, p. 34.1. 2 - 1. 9, appended hereto)

Respectfully Submitted,

/s/ Konrad Kuczak
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Attorney for Plaintiff
HERBERT GRUBB

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served on the Defendant,

Southwest Airlines, by and through its attorney of record by using the electronic filing system of the court. The electronic filing system sends a notice to Defendant's attorney of record, Ramona Martinez, who has consented to accept this notice as service of this document by electronic means.

/s/ Konrad Kuczak
KONRAD KUCZAK

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APPENDIX P

Excerpt Transcript of David Colunga
8/24/2004

* * *

[p.110]

Q. Do you –

A. Depending on what kind of training they're dong.

Q. Okay. To be in compliance with Southwest training program, periodically pilots have to come in and go through this procedure?

A. Uh-huh.

Q. Is that a "yes"?

A. Yes.

Q. Okay. And do they get any type of -- well, you're saying they're not certified, but within the company, do they have – I mean, they have – they have a schedule they have to keep every – how often do they have to came in for training?

A. Captains every six months. Actually, captains once a year for proficiency training, first officers, once every two years for proficiency training.

Q. Okay. And if the captains and the first officers don't do that, they can't fly for Southwest?

A. That's correct.

Q. Okay. I guess, just for the ease of the questioning, I'm going to refer to the pilots getting their certification, but what I'm actually making reference to is being in compliance with the company guidelines, okay?

[p.111]

A. Okay.

Q. Just so we have that understanding?

A. Okay.

Q. Do you think that Herb's condition causing him to nod off prohibits him from properly certifying these pilots under the Southwest requirements?

A. Yes.

Q. Okay. And you testified earlier that numerous of the pilot – numerous pilots or several pilots came in and told you hey, I saw Herb nodding off?

A. Uh-huh.

Q. Is that a "yes"?

A. That's a yes.

Q. Did you ever make them get recertified by a different instructor?

A. Actually, I had paperwork from Herb that Herb himself had signed and affirmed that all the required items in that training session had been performed satisfactorily.

Q. Okay. So the answer is no, I didn't make them get recertified; is that correct?

A. No, because I had paperwork signed by Herb that said he had affirmed -- he is affirming that they had all been trained.

Q. Okay. And that was done in all instances?

[p.112]

A. What was done in all instances?

Q. When the pilots came in and complained hey, my instructor was nodding off and made the complaints to you, in all instances, they had the paperwork --

A No, they don't get the paper -- unless they request a copy of it, they typically don't get the paperwork.

Q. But there was paperwork certifying that they had met all of --

A. Yeah, every instructor, every check pilot fills out that paperwork after they get out of the simulator, after they debrief the pilots, they fill out that

paperwork and they turn it in downstairs to training and scheduling before they leave the building.

Q. Okay. But the fact that Herb was nodding off and the fact that you think the -- his condition causing him to nodding off prevents him from doing his job and certifying these pilots, you didn't bother doing anything to get them recertified under the program, did you?

A. Actually, what they do with us is they go through training. Then they have to take a proficiency check administered by a Southwest check pilot who is a FAA designee. Okay. It's that proficiency check that the guy -- with us you can never fail a proficiency

[p.113]

training period. There is no -- I mean, you can't fail one. You can be asked to come back for more training, but you can't fail it. A proficiency check yes, can be failed, but that is only administered by a check pilot. All we do is the training portion of it.

MR. NOBLE: Okay. Again, I'm going to object as nonresponsive. I'm not concerned about check pilots after the fact.

Q. (By Mr. Noble) You've testified that Herb's medical condition keeps him from doing his job of performing these certifications under the Southwest policy, correct?

A. To the level that we want, yes. It --

Q. Okay.

A. -- keeps him from doing his job to the level professionalism that we're asking for.

Q. But every pilot that was certified by Herb and then came back and complained to you that he was nodding off, got to maintain their certification and move on down the road, didn't they?

A. They finished their training, their training was complete.

Q. Okay.

A. And Herb signed a form affirming that.

Q. And even though you thought that that was

* * *

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(2)

No. 08-873

IN THE

Supreme Court of the United States

HERBERT GRUBB,

Petitioner,

v.

SOUTHWEST AIRLINES CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should entertain petitioner's hypothetical that *Meacham v. Knolls Atomic Power*, 128 S. Ct. 2395 (2008), abrogated *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), when this petition involves neither case.

2. Whether the Court should resolve a circuit split as to the proper burden allocation in Family and Medical Leave Act ("FMLA") interference cases, when the burden more favorable to petitioner was applied in this case.

3. Whether the Court should re-visit the already resolved issue of burden allocation for a reasonable accommodation claim under the Americans with Disabilities Act ("ADA"), when petitioner failed to show he is a qualified individual with a disability.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Southwest Airlines Co. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

I. Factual Background

Petitioner Herbert Grubb was a Flight Crew Training Instructor for Southwest Airlines Co. ("Southwest"). Over an eighteen-month period, he repeatedly fell asleep while training pilots, while working at his computer, and while attending mandatory instructor meetings. He also failed to show up for work and was tardy on numerous occasions. Southwest gave Grubb a written warning that Southwest would suspend him if this behavior continued. Grubb again fell asleep while training pilots, and Southwest again counseled him. Grubb improved for a short time period, but he again began falling asleep and snoring loudly while training pilots, and he also had to be counseled about his poor hygiene. Southwest suspended Grubb for two weeks and warned him failure to improve his behavior could lead to termination of his employment.

When he returned from suspension, Grubb fell asleep again, and Southwest counseled him again. Grubb then said he was thinking about seeing a specialist. Southwest removed Grubb from the training schedule for the rest of the month and offered him time off to resolve his problem. Grubb did not take Southwest up on its offer. When Grubb continued falling asleep, Southwest requested a fact finding meeting to consider more severe disciplinary action. Grubb then requested three weeks off to participate in a sleep program. Southwest allowed him to take the time off and canceled the fact finding meeting. Upon returning to work, Grubb continued to fall asleep. Showing no improvement,

Southwest decided to terminate Grubb. Southwest held a fact finding meeting pursuant to a collective bargaining agreement and thereafter terminated Grubb.

Not until after the fact finding meeting did Grubb request FMLA leave, but at the time of his termination, the decision-makers did not know he had applied. At no time, however, did Grubb ever provide adequate medical documentation certifying the need for him to take FMLA leave. In fact, one doctor indicated that Grubb did not have a serious health condition. He also never requested an accommodation for any alleged disability, much less gave any indication that he had a disability.

II. Procedural Background

Grubb brought four claims against Southwest. First, he alleged Southwest terminated him in violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(D). Grubb did not specify whether he was claiming Southwest interfered with his FMLA rights under 29 U.S.C. § 2615(a)(1) ("FMLA interference"), or retaliated against him for requesting FMLA leave under 29 U.S.C. § 2615(a)(2) ("FMLA retaliation").[1] Second, Grubb alleged Southwest terminated him and refused to reasonably accommodate his sleep problem, allegedly "sleep apnea," in violation

[1] Courts use the terms FMLA "interference" and "entitlement" interchangeably, and FMLA "discrimination" and "retaliation" interchangeably. *See, e.g.*, *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 555 (6th Cir. 2006). For purposes of this brief, Southwest uses FMLA "interference" and FMLA "retaliation."

of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112.[2] Grubb did not specify whether he was claiming ADA discrimination or failure to accommodate. Third, Grubb alleged Southwest terminated him to interfere with his pension rights in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140. Fourth, Grubb alleged Southwest wrongfully terminated him to avoid paying him his pension in violation of state law.

Southwest sought summary judgment on all of Grubb's claims. Southwest argued Grubb could not establish a FMLA interference claim because he had a long history of behavioral problems and did not have a serious health condition. Southwest also argued Grubb could not establish a *prima facie* case of FMLA retaliation, and it terminated Grubb for the legitimate, non-discriminatory reason that he repeatedly fell asleep at work, and not because he requested FMLA leave. Southwest argued Grubb could not establish an ADA reasonable accommodation claim because Grubb did not have a disability, Grubb could not perform the essential functions of his job with or without an accommodation, and his suggested accommodation was unreasonable. On the ADA discrimination claim, Southwest argued that it terminated Grubb for the legitimate, non-discriminatory reason that he repeatedly fell asleep at work, and not because he allegedly had sleep apnea. Finally, Southwest argued ERISA preempted Grubb's state law claims, and Grubb failed to show specific intent to interfere with his ERISA benefits.

---

[2] Grubb did not mention he had sleep apnea until he filed his complaint.

In response, Grubb only addressed his FMLA claim. For the first time, he claimed he not only had sleep apnea, but also suffered from morbid obesity, which he argued in combination, constituted a serious health condition. Although he mentioned both FMLA interference and retaliation claims, he only argued FMLA retaliation.

Southwest's reply pointed out Grubb's failure to address his ADA, ERISA, and state law claims. Grubb then filed a two-page supplemental memorandum. Grubb argued that he had an absolute right to not be terminated upon requesting FMLA leave, and that he met the ADA's definition of disabled because no jobs existed "where he would be permitted to nod off while on the job."[3] He also argued Southwest could have accommodated him by changing his work shift. He again did not clarify if he was making an ADA accommodation or ADA discrimination claim.

The district court, in an unpublished opinion, granted summary judgment in favor of Southwest on all claims. (Pet. App. at 36a.) The court assumed *arguendo* that Grubb had a disability under the ADA, but found he was not qualified because he could not perform the essential functions of his job with or without a reasonable accommodation, and noted Southwest satisfied its accommodation duty. (Pet. App. at 29a.) The

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[3] Like his FMLA claim, Grubb's ADA claim has been a moving target. First he had a sleep problem, then he had sleep apnea, then he had a heart condition, and then he had sleep apnea combined with morbid obesity. Similarly, he claimed he was precluded from the major life activity of lifting, then it was working, talking, flying, and driving, and then it was sleeping.

court then used the *McDonnell Douglas* burden-shifting analysis and found that Grubb could not show his termination was a pretext for disability discrimination. (Pet. App. at 29a-31a.) Addressing Grubb's FMLA claim, the court found that Grubb failed to make out a *prima facie* case of FMLA retaliation because the only evidence he presented was "the timing of his termination and the filing of his FMLA claim," and found he could not refute that Southwest terminated him due to his behavior of falling asleep. (Pet. App. at 32a-33a.) The district court therefore granted summary judgment on Grubb's ADA and FMLA claims, and also went on to grant summary judgment on Grubb's ERISA and state law claims.

Grubb filed a motion to alter or amend the judgment. He claimed the district court erroneously used the *McDonnell Douglas* framework to analyze his FMLA interference claim or ignored it altogether. The court summarily denied the motion. (Pet. App. at 17a.)

The Fifth Circuit affirmed in a per curiam, unpublished opinion.[4] (Pet. App. at 16a.) Grubb claimed he had alleged FMLA interference and ADA reasonable accommodation only, and therefore, the district court should not have used *McDonnell Douglas*.[5] Nevertheless, Grubb argued he presented enough evidence to survive summary judgment on a FMLA retaliation claim.[6] The Fifth Circuit disagreed.

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[4] Unpublished Fifth Circuit opinions have no precedential value. 5TH CIR. R. 47.5.4.

[5] Grubb did not appeal the dismissal of his ERISA or state law wrongful termination claims.

[6] Grubb continued to insist that his ADA claim was only for accommodation.

The Fifth Circuit analyzed claims for both FMLA interference and FMLA retaliation. The court found a fact issue may have existed as to whether Grubb had a serious health condition, and therefore he arguably may have made out a *prima facie* case of FMLA retaliation. (Pet. App. at 13a.) However, his retaliation claim still failed because he could not show requesting leave was a reason for his firing. (Pet. App. at 14a.) His FMLA interference claim likewise failed because, as the court stated, an employee who requests FMLA leave is not afforded greater rights than if he had not requested leave, and "for purposes of the FMLA—if not the ADA—one can be fired for poor performance even if that performance is due to the same root cause as the need for leave." (Pet. App. at 15a-16a.)

On the ADA accommodation claim, the court assumed *arguendo* that Grubb had a disability, but found he was not qualified because he could not perform the essential functions of his job with or without a reasonable accommodation. The court also found that Southwest satisfied any reasonable accommodation duty it might have owed. (Pet. App. at 8a-10a.) The court deemed the ADA discrimination claim waived because Grubb insisted he did not bring that claim. As such, the Fifth Circuit affirmed the district court's grant of summary judgment in its entirety. (Pet. App. at 16a.)

Grubb then filed this petition for writ of certiorari, which is limited to his FMLA interference and ADA reasonable accommodation claims. In it, Grubb relies on wholly inapposite case law, misrepresents the lower courts' opinions, and creates the illusion of a circuit split where none exists. For these reasons, as more fully set forth below, the Court should not grant certiorari.

REASONS FOR DENYING THE PETITION

No compelling reason exists for the Court to grant certiorari. There is nothing special about this case. It involves typical FMLA/ADA claims with no grand issues worthy of Supreme Court review. It is highly fact specific, based on petitioner's ever-changing allegations, and has no legal significance—so much so that neither the district court nor the Fifth Circuit thought it worthy of publishing.

The bottom line is that Southwest fired Grubb for sleeping on the job and being absent and tardy over an eighteen-month period, despite numerous warnings to resolve his issues. His eleventh hour FMLA and ADA allegations did not arise until after Southwest had already made the decision to terminate him. He has never shown he has a serious health condition or a disability. Essentially, what Grubb wants is for the Court to require employers to not only allow, but also provide accommodations for, employees to sleep on the job without repercussions. Nothing in the ADA, the FMLA, or case law allows such a bizarre result. The Court should therefore deny the petition for writ of certiorari.

I. Neither the Decision Below Nor the Factual Record Rests on *Meacham* or *McDonnell Douglas*.

Grubb claims the Court repudiated the well-established *McDonnell Douglas*[7] burden-shifting analysis in *Meacham v. Knolls Atomic Power*, 128 S. Ct.

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[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

2395 (2008). *Meacham* has nothing to do with *McDonnell Douglas*, and neither case has anything to do with the claims at issue in this petition. Indeed, the Fifth Circuit did not even apply *McDonnell Douglas* analysis to Grubb's FMLA interference or ADA reasonable accommodation claims. Further, the Court does not have the benefit of the judicial analysis of *Meacham's* effect, if any, on *McDonnell Douglas* because neither the Fifth Circuit nor any other courts have considered this argument.

A. *Meacham* and *McDonnell Douglas* are irrelevant.

Meacham did not repudiate or otherwise affect *McDonnell Douglas*. *Meacham* was a disparate impact case analyzing the specific statutory construction of a specific defense listed in the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621. The Court considered whether the "reasonable factor other than age" ("RFOA") exception to age discrimination constitutes an affirmative defense on which the employer bears the burden of persuasion. *Meacham*, 128 S. Ct. at 2401. The Court concluded that Congress intended RFOA to be an affirmative defense because it is an exception to "otherwise prohibited" age discrimination, plus RFOA is set forth in an entirely different section of the ADEA. *Id.* at 2400.

In contrast, *McDonnell Douglas* is an evidentiary burden-shifting framework used in disparate treatment cases. *McDonnell Douglas* is not used to evaluate affirmative defenses and is not an exception set forth in any statute. *Meacham* therefore has no impact on

McDonnell Douglas. Indeed, *Meacham* does not even mention *McDonnell Douglas*—not even in passing.[8] The Court also gave no indication that it intended *Meacham* to repudiate *McDonnell Douglas*. The Court likewise made no broad pronouncements as to congressional intent, as Grubb contends, much less any pronouncements on the FMLA or ADA provisions at issue in this case. Likewise, Congress has not indicated an intent to repudiate *McDonnell Douglas*. Certainly, Congress has had sufficient time to pass legislation overturning or modifying *McDonnell Douglas* if in fact it is inconsistent with congressional intent.

In any event, neither *Meacham* nor *McDonnell Douglas* has anything to do with this petition. *Meacham* involved disparate impact. *McDonnell Douglas* involved disparate treatment. This petition, as conceded by Grubb, involves neither. Rather the petition involves claims of ADA reasonable accommodation and FMLA interference. Further, neither the ADA reasonable accommodation nor the FMLA interference provisions contain the "otherwise prohibited" language at issue in *Meacham*. As the Court explained, "Congress understands the [otherwise prohibited] phrase . . . as a clear signal that a defense to what is 'otherwise prohibited' is an affirmative defense, entirely the responsibility of the party raising it." *Meacham*, 128 S. Ct. at 2402. Grubb does not contend that "otherwise prohibited" language is at issue in this case. Because Congress did not include this language in the ADA or

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[8] Grubb even admitted to the Fifth Circuit that *Meacham* does "not directly address" the *McDonnell Douglas* burden-shifting protocol.

the FMLA, *Meacham* is wholly inapposite. *See, e.g., id.* at 2405 (noting that *Smith v. City of Jackson*, 544 U.S. 228 (2005) "could not have had the [RFOA] clause in mind as 'identical' to anything in Title VII . . . for that statute has no like-worded defense").

The effect, if any, *Meacham* may have on *McDonnell Douglas*, is irrelevant to this case because the Fifth Circuit did not even use *McDonnell Douglas* burden-shifting analysis to evaluate Grubb's ADA reasonable accommodation or FMLA interference claims. The Fifth Circuit evaluated Grubb's FMLA claims as if he had "appeal[ed] the denial of his [FMLA] claim on both retaliation and entitlement grounds." (Pet. App. at 11a, 15a.) The court, therefore, used the *McDonnell Douglas* framework to analyze the FMLA retaliation claim, and then conducted a completely different, non-*McDonnell Douglas*, analysis for Grubb's FMLA interference claim. The portion of the Fifth Circuit's opinion Grubb cites in his petition comes from the analysis of the retaliation claim, not the interference claim. (*See* Pet. at 14-15.) The Fifth Circuit also did not apply *McDonnell Douglas* on Grubb's ADA claim. The court specifically stated that Grubb waived his ADA discrimination claim by asserting he never brought one. Therefore, the court did not use *McDonnell Douglas* at all on the claims at issue in this petition.

B. The courts have not analyzed the impact of *Meacham* on *McDonnell Douglas*.

Even if *Meacham* has an impact on *McDonnell Douglas*, this case is not the proper vehicle for the Court to consider its effect. No lower court, including the courts in this case, has considered the issue. Grubb did not raise *Meacham* until after the parties completed briefing before the Fifth Circuit. Even then, he filed a short letter simply stating, "While not directly addressed in *Meacham*, it would appear that the *McDonnell Douglas* . . . burden shifting framework . . . has been inferentially abrogated."[9] Southwest responded that *Meacham* was inapplicable. The Fifth Circuit did not request additional briefing from the parties and did not address *Meacham* at all in its opinion.

In addition, no other court has addressed whether *Meacham* impacts *McDonnell Douglas*. The Court only recently decided *Meacham* less than a year ago. Therefore, the lower courts have not had an opportunity to fully analyze *Meacham*, much less consider its impact, if any, on *McDonnell Douglas*. As such, this argument is not ripe for the Court's consideration.

II. This Case Is a Poor Vehicle for Resolving Any FMLA Circuit Split.

This case is a poor vehicle for resolving any circuit split on FMLA interference claims. The Court would

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[9] Grubb raised the issue in a Rule 28(j) letter, which is not the proper method to raise a new argument. *See* FED. R. CIV. P. 28(j); *Spiegla v. Hull*, 481 F.3d 961, 964-65 (7th Cir. 2007).

never reach the FMLA circuit split because Grubb never created a fact issue that he was entitled to leave, or that the decision-makers knew he applied for FMLA leave. Moreover, the Fifth Circuit applied the FMLA law of the circuits more favorable to Grubb. His FMLA claims did not survive summary judgment under more favorable case law, *a fortiorari*, his FMLA claim cannot survive under less favorable case law. In any event, Grubb waived this circuit split argument by not raising it in the lower courts.

A. The Court would never reach the FMLA circuit split.

Grubb correctly asserts that a circuit split exists, but that split has no impact on the outcome of this petition. The circuit split involves the proper burden allocation in FMLA interference claims. The circuits agree that the employee initially bears the burden of proving he was entitled to take FMLA leave. *See, e.g.*, *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963-64 (10th Cir. 2002); *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1017 (7th Cir.), *cert. denied*, 531 U.S. 1012 (2000). However, the circuits are split as to who bears the burden of proving whether or not the employee would have been terminated had he not requested leave. The Sixth and Seventh Circuits take the position that the *employee* must prove he would not have been terminated if he had not requested or taken FMLA leave. *See Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 488-89 (6th Cir. 2005); *Rice*, 209 F.3d at 1018. The Fifth, Eighth, Tenth, and Eleventh Circuits take the opposite position and place the burden on the *employer* to prove the employee would have been

terminated regardless of his FMLA leave request. *See Grubb v. Southwest Airlines*, 296 Fed. Appx. 383, 391 (5th Cir. 2008); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 979 (8th Cir. 2005); *Smith*, 298 F.3d at 963-64; *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354 (11th Cir. 2000).

The Court would never reach this FMLA circuit split because Grubb presented no summary judgment evidence to satisfy his initial burden of proving that he was entitled to take FMLA leave. Southwest provided evidence that when Grubb asked about the possibility of FMLA leave, he was not seeking inpatient care. *See* 29 U.S.C. § 2611(11). Nor did Grubb have a condition requiring continuing treatment that rendered him unable to work for more than three consecutive calendar days. *See* 29 C.F.R. § 825.114(a)(2). Grubb never provided the medical certification required, nor did a doctor ever recommend that Grubb take FMLA leave. To the contrary, Grubb's doctor completed a medical form indicating that Grubb did not have a serious health condition. In response, Grubb provided no evidence whatsoever that he had a serious health condition. Because Grubb could not create an issue of fact on his initial burden, the Court would never reach the circuit split on the appropriate burden allocation for FMLA interference claims.

B. The Fifth Circuit applied the circuit law more favorable to Grubb.

The Court would also not reach the circuit split because the Fifth Circuit applied law from the side of the circuit split that is more favorable to Grubb. Grubb

incorrectly claims the court below followed the Seventh Circuit's decision in *Rice* and placed the burden on him to show he would not have been terminated had he not requested leave. Grubb argues the court below should have followed the Tenth Circuit and put the burden on Southwest to show that it would have terminated Grubb regardless of his requesting FMLA leave. The Fifth Circuit did in fact apply the Tenth Circuit's rationale. The Fifth Circuit specifically relied on and quoted from case law providing that an employer is not liable for FMLA interference "if the *employer* can prove it would have made the same decision had the employee not exercised the employee's FMLA rights." (Pet. App. at 15a-16a (emphasis added).) The language the court quoted is from the Eighth Circuit case, *Throneberry*, which adopted the Tenth Circuit's reasoning. *See Throneberry*, 403 F.3d at 979 ("We find the Tenth Circuit's reasoning in *Smith* [*v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002)] relating to interference claims convincing.").

Placing the burden on Southwest, the Fifth Circuit found that Grubb's termination was proper. (Pet. App. at 16a.) Southwest's summary judgment evidence established that it would have terminated Grubb regardless of his request for FMLA leave. Grubb had an eighteen-month history of failing to show up for work, tardiness, and falling asleep while training pilots, all of which occurred before he requested FMLA leave. (Pet. App. at 19a.) Grubb was well aware that if he continued to fall asleep at work, he would be terminated. He received counseling, warnings, and a suspension, and he still continued to fall asleep. These facts are undisputed. Before the fact finding meeting, the

decision-makers already knew Southwest had no other option but to terminate Grubb, but they held the meeting nonetheless in order to comply with a collective bargaining agreement. Not only was the decision to terminate Grubb made before Grubb requested FMLA leave, but at the time of Grubb's termination, the decision-makers were not aware he had even requested leave. Grubb met with Southwest's FMLA coordinator, who was in a department separate and apart from the decision-makers. (Pet. App. at 5a, 24a.) Grubb offered no evidence to the contrary. (Pet. App. at 5a.) Therefore, Grubb failed to create an issue of fact because he presented no evidence whatsoever to refute that Southwest would have terminated him regardless of his leave request.

Because the Fifth Circuit placed the burden on Southwest, Grubb received the benefit of the lower burden, and therefore Grubb was not aggrieved by the circuit split. Given that Grubb's FMLA interference claim did not survive summary judgment with the burden on Southwest, the claim certainly could not have survived summary judgment with the burden on Grubb. Therefore, irrespective of who bears the burden of proof, Grubb's claim would still fail, and the Court would never reach the circuit split.

C. Grubb waived the FMLA circuit split argument.

Grubb waived the FMLA circuit split argument by raising it for the first time in his petition for writ of certiorari. In the district court, Southwest outlined the burden allocation under which to evaluate FMLA

interference claims, and placed the burden on Southwest to show it would have made the same decision had Grubb not requested FMLA leave. Grubb did not refute this in his response brief, nor would it have made sense for Grubb to ask the court to shift the burden onto him. Grubb also did not bring up the circuit split in his summary judgment supplemental brief, or before the Fifth Circuit, despite Southwest addressing the issue again. Moreover, in both the district court and Fifth Circuit briefing, Grubb failed to cite even one case on burden allocation, much less the Tenth Circuit case upon which he now relies, or to even address the cases cited by Southwest.

In fact, Grubb's complete failure to bring the circuit split to the Fifth Circuit's attention may have been one of the reasons the court chose not to publish the opinion. *See* 5TH CIR. R. 47.5.1 (declining to publish opinions that involve "well-settled principles of law" or that do not "create or resolve[] a conflict of authority"). Because Grubb did not raise or ask the lower courts to resolve the circuit split, he has waived the circuit split argument.

III. No Circuit Split Exists on ADA Reasonable Accommodation Claims.

Grubb claims a circuit split exists as to whether the *McDonnell Douglas* analysis applies in ADA failure to accommodate claims. This assertion is incorrect. Every circuit that has considered the issue, including the Fifth Circuit below, has adopted the Court's burden allocation, as most recently set forth in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). However, the Court would never reach the issue of whether a circuit split exists

because under both *McDonnell Douglas* and ADA accommodation analysis, Grubb still had to prove he was a qualified individual with a disability, which he could not do.

A. Under any analysis, Grubb could not prove he was protected under the ADA.

Under any ADA analysis, Grubb must first establish he is a "qualified individual" with a disability. *See* 42 U.S.C. § 12112. Southwest provided summary judgment evidence that Grubb was not disabled because he did not have an impairment and was not substantially limited in any major life activity. Grubb provided no evidence to establish his alleged disability, or any evidence that he was substantially limited in any major life activity. Indeed, Grubb did not even address his ADA claim in his response brief. It was not until after Southwest pointed out his failure to address his ADA claim, that he sought leave to file a supplemental brief to address his ADA claim. As to whether he had a cognizable disability, the only argument Grubb made in his supplemental brief is that Southwest "provided no evidence that Mr. Grubb could have performed any other job where he would be permitted to nod off while on the job." This smaller than a scintilla of evidence was insufficient to survive summary judgment.

Nevertheless, the Fifth Circuit assumed, without deciding, that Grubb had a covered disability, but found that he was not a "qualified individual" under the ADA. (Pet. App. at 8a-9a.) In doing so, the court relied on the ADA's definition that "[a] qualified individual with a disability means an individual with a disability who, with

or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Finding that Grubb's alleged disability prevented him from being conscious and alert, a basic element of the performance of his job as a flight instructor, the Fifth Circuit correctly found he was not a qualified individual under the ADA. (Pet. App. at 9a); *see also Cannon v. Monsanto Co.*, 2008 U.S. Dist. LEXIS 6107, at *12 (E.D. La. Jan. 25, 2008) ("Despite the factual dispute concerning whether sleep apnea constitutes a disability, the fact that the sleep apnea caused [p]laintiff to sleep on the job removed ADA protection.").

Grubb also failed to meet the ADA's standard for a qualified individual because he refused to manage his alleged sleep apnea. *See Amato v. St. Luke's Episcopal Hosp.*, 987 F. Supp. 523, 530 (S.D. Tex. 1997) ("[N]o disabled person is 'qualified' if he needs accommodation precisely because he failed to manage an otherwise controllable disorder."); *Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995) (finding that an employee has no claim under the ADA when he does not meet the employer's legitimate job expectations as a result of failing to control his controllable disability). Southwest asserted in its summary judgment motion that Grubb repeatedly failed to seek help, failed to follow his doctor's instructions, did not use his CPAP breathing machine as required to treat his sleep apnea, and never followed through with his doctor's recommendation to properly recalibrate the machine. Accordingly, under any ADA analysis Grubb could not show he was a qualified individual with a disability, and the Court would never reach the issue of any alleged circuit conflict.

B. No circuit has adopted *McDonnell Douglas* analysis for ADA accommodation claims.

In any event, contrary to Grubb's assertion, no circuit split exists on whether to apply the *McDonnell Douglas* burden-shifting analysis to ADA reasonable accommodation claims.[10] To be sure, the circuits once wrestled with the appropriate burden allocation for ADA reasonable accommodation claims. *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000) ("Courts have struggled to define the appropriate burdens of persuasion when . . . an employee seeks relief on the ground that his employer failed to 'reasonably accommodate' his disability."). Courts now uniformly use the following framework for ADA reasonable accommodation claims: (1) the employee must prove that he has a disability; (2) the employee must prove he is a qualified individual, meaning that he can perform the essential functions of his job with or without an accommodation; and (3) the employee must show that a reasonable accommodation exists. If the employee meets this initial burden, then the employer bears the burden of proving that the proposed accommodation would pose an undue hardship, given the specific circumstances of the case. *See, e.g.*, *Riel v. Electronic Data Sys. Corp.*, 99 F.3d 678, 681-84 (5th Cir. 1996); *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir.), *cert. denied sub nom.*, *Barth v. Duffy*, 511 U.S. 1030 (1994). In confirming this framework, the Court took notice that "[n]ot every court has used the same language, but their results are

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[10] Ironically, while arguing a circuit split exists, Grubb also argues that "[b]urden-shifting in reasonable accommodation cases has been widely repudiated." (Pet. at 21.)

functionally similar." *See U.S. Airways*, 535 U.S. at 401-02. The Court, therefore, also recognizes the absence of a circuit split in analyzing ADA accommodation claims.[11]

The Fifth Circuit below used the same framework used by the Court and by the circuit courts when it granted summary judgment on Grubb's ADA reasonable accommodation claim. (*See* Pet. App. at 9a-10a (citing *Jenkins v. Cleco Power, LLC*, 487 F.3d 309 (5th Cir. 2007); *Foreman v. Babcok & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996)).) The court assumed *arguendo* that Grubb was disabled, but found that he was not a qualified individual because he could not perform the essential functions of his job, namely remaining conscious and alert, with or without a reasonable accommodation.

Grubb also failed to create an issue of fact that a reasonable accommodation existed that would keep him from falling asleep while working. Grubb now claims a shift change would have been a reasonable accommodation, but Grubb never asked for a shift change. Regardless, Grubb presented no evidence that a shift change would have stopped him from sleeping on the job, and allowing him to sleep on the job during a different time of day would not have constituted a reasonable accommodation under the ADA.

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[11] The Fifth Circuit's decision to not published its opinion further supports the absence of a circuit split. *See* 5TH CIR. R. 47.5.1 (declining to publish opinions that involve "well-settled principles of law" or that do not "create or resolve[] a conflict of authority").

At most, Grubb's doctor suggested he try a schedule change to see if that might help him stop sleeping on the job. Nothing in the ADA, or the FMLA for that matter, requires an employer to assist in the experimental treatment of the symptoms of an alleged disability or an alleged serious health condition. Nor is an employer required to wait around for over eighteen months to see if something might keep an employee from falling asleep. As the Fifth Circuit noted, a "reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential function of the job." (Pet. App. at 10a (quoting *Rogers*, 87 F.3d at 759-60).) After eighteen months, Grubb was still unable to perform the essential functions of his job, and therefore no reasonable accommodation existed.

Southwest also presented summary judgment evidence that changing Grubb's schedule would not be reasonable because it would "impose inordinate burdens on other [Southwest] employees." (Pet. App. at 10a.) In response, Grubb provided no evidence to refute this or to otherwise show that changing his schedule would have been reasonable. Grubb is therefore incorrect that "the circuit court allowed Southwest to simply articulate an 'undue hardship' defense."

In an attempt to create the illusion of a circuit split, Grubb quotes from the district court's *McDonnell Douglas* analysis of what the district court believed was an ADA discrimination claim. (*See* Pet. at 20-21.) Grubb fails to make clear that the Fifth Circuit did not use *McDonnell Douglas* at all on his ADA claim. Instead, it specifically found that Grubb waived any ADA

discrimination claim by vehemently denying he had brought one. (Pet. App. at 10a.) Therefore, the Fifth Circuit only analyzed Grubb's ADA claim as a reasonable accommodation claim, and nowhere in its ADA analysis did the Fifth Circuit cite, much less rely on, the *McDonnell Douglas* burden-shifting framework.[12]

IV. The FMLA Does Not Require an Employer to Tolerate Behavior that Interferes with an Employee's Job Performance.

Grubb argues that the Fifth Circuit's analysis results in an employer being able to avoid liability under the FMLA by terminating an employee and merely articulating that the termination was due to poor performance. His argument boils down to his mistaken belief that an employee cannot be terminated for performance problems that stem from a FMLA-covered serious health condition. The circuits disagree with Grubb's argument. Rather, courts uniformly hold that an employee who requests FMLA leave is not completely immunized from adverse employment action. Specifically, "the FMLA does not protect an employee from performance problems caused by the condition for which FMLA leave is taken . . . ." *McBride v. Citgo Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002) (noting that the employee alleged she was terminated because of performance problems related to her illness, not because she took FMLA leave). It is well-established that "an employee who requests FMLA leave would have no greater protection against his or her

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[12] In fact, the Fifth Circuit never cites *McDonnell Douglas* in any portion of its opinion.

employment being terminated for reasons not related to his or her FMLA request than he or she did before submitting the request." *Renaud v. Wyoming Dept. of Family Servs.*, 203 F.3d 723, 732 (10th Cir. 2000) (finding no FMLA interference where employee was terminated for performance reasons relating to his health condition after requesting FMLA leave). The courts reason that "[t]o limit an employer's ability to terminate an employee for performance issues simply because the employee requested medical leave would vest the employee with greater rights and benefits than she would have enjoyed had she continued working without requesting such leave." *Burton v. Buckner Children & Family Servs., Inc.*, 2003 U.S. Dist. LEXIS, at *17-18 (N.D. Tex.), *aff'd*, 104 Fed. Appx. 394 (5th Cir. 2004), *cert. denied*, 543 U.S. 1050 (2005). Therefore, the FMLA does not require an employer to tolerate or accommodate the effects of an alleged serious health condition if the condition interferes with job performance.[13] The Fifth Circuit correctly held that Southwest could terminate Grubb for falling asleep on the job, even if his falling asleep was related to his alleged need to take FMLA leave. (Pet. App. at 16a.)

As to Grubb's claim that the Fifth Circuit granted summary judgment based on Southwest's mere articulation of performance issues, this is incorrect. As set forth in Section II.B above, the Fifth Circuit placed the burden on Southwest to show that it would have terminated Grubb even if he had not requested FMLA leave. Southwest met this burden, and Grubb failed to

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[13] Reasonable accommodation language only appears in the ADA, not the FMLA.

refute it. The Fifth Circuit properly affirmed summary judgment in Southwest's favor.

CONCLUSION

For the foregoing reasons, Southwest respectfully asks the Court to deny Petitioner Herbert Grubb's Petition for a Writ of Certiorari.

Respectfully submitted,

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